

Exhibit A

Plaintiffs' List of Counts and Elements of Proof

1 Plaintiffs filed the Complaint on behalf of their respective jurisdictions against
 2 Michael D. Lansky, L.L.C., dba Avid Telecom, Michael D. Lansky, individually and as
 3 Chief Executive Officer, and Stacey Reeves, individually and as Vice President of
 4 Operations and Sales, (collectively “Defendants”) alleging violations of the Telemarketing
 5 Sales Rule (“TSR”), 16 C.F.R. § 310 *et seq.*; the Telephone Consumer Protection Act
 6 (“TCPA”), 47 U.S.C. § 227 *et seq.*; the Truth in Caller ID Act (“TCIA”), 47 U.S.C.
 7 § 227(e) and certain state laws. For each count of the Complaint, a summary is provided
 8 below as to the elements of proof, affirmative defenses and the respective burdens of proof.

9 **COUNT I – By All Plaintiffs**

8 **Violations of the Federal Telemarketing Sales Rule**

9 **16 C.F.R. §§ 310.3(b)**

10 1. Plaintiffs must show they are proper parties to bring claims under the
 11 Telemarketing Act, 15 U.S.C. §§ 6103(a) and (f)(2). Plaintiffs must show they: 1) are
 12 attorneys general of their State or other authorized officers of their States; 2) had reason to
 13 believe that the interests of the residents of their states had been or were being threatened
 14 or adversely affected because any person had engaged or was engaging in a pattern or
 15 practice of telemarketing which violated any rule promulgated by the FTC under 15 U.S.C.
 16 § 6102; 3) as *parens patriae*, brought the action on behalf of residents of their states; 4) in
 17 an appropriate district court of the United States; 5) to enjoin such telemarketing, to enforce
 18 compliance with such rule of the Commission, to obtain damages, restitution or other
 19 compensation on behalf of such residents of their States, or to obtain such further and other
 20 relief as the court may deem appropriate.

21 2. The Federal Trade Commission promulgated the TSR including, 16 C.F.R.
 22 § 310.3(b), under its authority pursuant to 15 U.S.C. § 6102.

23 3. Plaintiffs allege in Count I of the Complaint that Defendants violated the
 24 TSR, 16 C.F.R. § 310.3(b). To prevail, the Plaintiffs must show that Defendants provided
 25 substantial assistance or support to any seller or telemarketer engaged in telemarketing
 26 while Defendants knew or were consciously avoiding knowing that the seller or

1 telemarketer was engaged in acts or practices that violated TSR §§ 310.3(a), (c) or (d), or
2 310.4, including but not limited to whether the seller or telemarketer:

- 3 A. Misrepresented material aspects of goods or services, in violation of
4 16 C.F.R. § 310.3(a)(2)(iii);
5 B. Misrepresented the seller's or telemarketer's affiliation with
6 corporations or government entities, in violation of 16 C.F.R.
7 § 310.3(a)(2)(vii);
8 C. Made false or misleading statements to induce any person to pay for
9 goods or services, in violation of 16 C.F.R. § 310.3(a)(4);
10 D. Failed to transmit or cause to be transmitted the telephone number,
11 and, when made available by the telemarketer's carrier, the name of the
12 telemarketer, to caller identification services used by call recipients in
13 violation of 16 C.F.R. § 310.4(a)(8);
14 E. Initiated or caused the initiation of outbound calls to telephone
15 numbers on the National DNC Registry, in violation of 16 C.F.R.
16 § 310.4(b)(1)(iii)(B);
17 F. Initiated or caused the initiation of outbound telephone calls that
18 delivered prerecorded messages, in violation of 16 C.F.R. § 310.4(b)(1)(v);
19 and/or
20 G. Failed to disclose the identity of the seller of the goods or services
21 truthfully, promptly, and in a clear and conspicuous manner to the person
receiving the call, in violation of 16 C.F.R. § 310.4(d)(1).

4. The TSR does not define "substantial assistance or support" but the FTC has
5 provided guidance on its rule and a number of courts, including courts in the Ninth Circuit
6 and others have defined it. Courts have found "substantial assistance or support" to include
7 three elements: (1) there must be an underlying violation of the TSR; (2) the person must
8 provide substantial assistance or support to the seller or telemarketer violating the TSR;
9 and (3) the person must know or consciously avoid knowing that the seller or telemarketer

1 is violating the TSR. *FTC v. Lake* 181 F. Supp. 3d 692, 700–01 (C.D. Cal. 2016). “The
 2 threshold for what constitutes substantial assistance is low” *Id.* and requires showing only
 3 more than “mere casual or incidental assistance to the telemarketer.” *Consumer Financial*
4 Protection Bureau v. Daniel A. Rosen, Inc., 2022 WL 1514439, *4 (C.D.Cal. 2022).
5 Consumer Financial Protection Bureau v. Nesheiwat, No. 21-56052, 2022 WL 17958636,
 at *1 (9th Cir. Dec. 27, 2022); *FTC v. Consumer Health Benefits Ass'n*, No. 10-CV-3551
 6 (ILG), 2011 WL 3652248, at *5 (E.D.N.Y. Aug. 18, 2011) (quoting Telemarketing Sales
 Rule, 60 Fed. Reg. 43842-01, 43852 (Aug 23, 1995)). Substantial assistance “does not
 7 impose a demanding standard[.]” *FTC v. Day Pacer LLC*, 689 F. Supp. 3d 609, 642, (N.D.
 Ill. 2023).

8 5. “To constitute substantial assistance, there must be a connection between the
 9 assistance provided and the resulting violations of the core provisions of the TSR. *U.S. v.*
 10 *Dish Network, L.L.C.*, 667 F. Supp. 2d 952, 961, (C.D. Ill. 2009). The TSR does not require
 11 a showing of a direct connection between the substantial assistance given and the
 12 underlying violation. *See F.T.C. v. Chapman*, 714 F.3d 1211, 1216 (10th Cir. 2013)
 13 (Noting the Commission rejected a rule that proposed a requirement that the “substantial
 14 assistance [be] related to the commission or furtherance of that act or practice.” Statement
 of Basis and Purpose and Final Rule, Telemarketing Sales Rule, 60 Fed. Reg. 43842, 43852
 (Aug. 23, 1995)).

15 6. Knowledge can be inferred from a combination of suspicion and indifference
 16 to the truth. See *United States v. Salinas*, 763 F.3d 869, 875 (7th Cir. 2014) (discussing the
 17 “ostrich instruction”); *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 769 (2011)
 18 (finding that a willfully blind defendant takes deliberate actions to avoid confirming a high
 19 probability of wrongdoing). Knowledge may be inferred when the person providing
 20 assistance receives complaints about violations. *FTC v. Day Pacer LLC*, 689 F. Supp. 3d
 at 642. Further, “knowledge of the agent is imputed to the principal.” *United States v. Dish*
Network L.L.C., 954 F.3d 970, 978 (7th Cir. 2020).

21

1 7. A person consciously avoids knowing about a violation when “there are facts
 2 and evidence that support an inference of deliberate ignorance.” *Id.*; *see also United States*
 3 *v. L.E. Myers Co.*, 562 F.3d 845, 854 (7th Cir. 2009); *F.T.C. v. Chapman*, 714 F.3d 1211,
 4 1219 (10th Cir. 2013) (quoting Fed. Trade Comm'n, *Complying with the Telemarketing*
 5 *Sales Rule*, (Feb. 2011), [https://www.ftc.gov/business-guidance/resources/complying-](https://www.ftc.gov/business-guidance/resources/complying-telemarketing-sales-rule)
 6 *telemarketing-sales-rule*) (“[T]aking deliberate steps [*43] to ensure one’s own ignorance
 7 of a seller or telemarketer’s Rule violations is an ineffective strategy to avoid liability.”).

8 8. As to the underlying TSR violations, the Plaintiffs will bear the burden of
 9 showing calls at issue meet the following definitions:

10 A. A “seller” is “any person who, in connection with
 11 a telemarketing transaction, provides, offers to provide, or arranges for
 12 others to provide goods or services to the customer in exchange for
 13 consideration.” 16 C.F.R. § 310.2(dd)

14 B. “Telemarketing,” in relevant part, as “a plan, program, or campaign
 15 which is conducted to induce the purchase of goods or services . . . by use of
 16 one or more telephones and which involves more than one interstate
 17 telephone call.” 16 C.F.R. § 310.2(gg)

18 C. A “telemarketer” is “any person who, in connection with
 19 telemarketing, initiates or receives telephone calls to or from a customer or
 20 donor.” 16 C.F.R. § 310.2(ff)

21 9. The Plaintiffs must prove the elements of the TSR violation by a
 1 preponderance of the evidence. *F.T.C. v. Com. Planet, Inc.*, 878 F. Supp. 2d 1048, 1055
 2 (C.D. Cal. 2012), *aff’d in part*, 642 F. App’x 680 (9th Cir. 2016), and *aff’d in part, vacated*
 3 *in part, remanded*, 815 F.3d 593 (9th Cir. 2016).

4 10. A party claiming an exemption from coverage under the TSR or that calls
 5 meet an exemption under the TSR bear the burden of proof. The established business
 6 relationship and the telemarketing to business call provisions of the TSR are written as
 7 exemptions to the general rule. An exemption from the general rule is treated as an

1 affirmative defense for which the party asserting the defense bears the burden of proof.
 2 *United States v. Dish Network*, 75 F. Supp. 3d 942 (C.D. Ill. 2014) (*vacated in part on*
 3 *other grounds*); *Shaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528, 534, 163 L.
 4 Ed. 2d 387 (2005) (burden of proof shifts to defendant when element can be fairly
 5 characterized as an exemption); *Tourgeman v. Nelson & Kennar*, 900 F.3d 1105 (9th Cir.
 6 Cal. 2018.).

7 11. A defendant is individually liable for corporate violations of the TSR if “(1)
 8 he participated directly in the [unlawful] acts *or* had the authority to control them and (2)
 9 he had knowledge of [such conduct] . . . or was aware of a high probability of” such conduct
 10 and “intentional[ly] [*3] [*3] avoid[ed] . . . the truth.” *Consumer Financial Protection*
 11 *Bureau v. Nesheiwat*, No. 21-56052, 2022 WL 17958636, at *1 (9th Cir. Dec. 27, 2022)
 12 (quoting *FTC v. Stefanchik*, 559 F.3d 924, 931 (9th Cir. 2009)).

COUNT II – By All Plaintiffs

Violations of the Federal TCPA – 47 U.S.C. § 227 and 47 C.F.R. § 64.1200(n)(3) (Failure to Exercise Due Diligence/KYC)

13 12. To target and eliminate unlawful robocalls, the FCC requires that all
 14 originating voice service providers know their customers and exercise due diligence in
 15 ensuring that their services are not used to originate illegal traffic and further recommends
 16 that voice service providers exercise caution in granting access to high-volume origination
 17 services, to ensure that bad actors do not abuse such services.

18 13. The FCC has authorized and encouraged voice service providers to block
 19 calls in specific circumstances. TCPA rule 47 C.F.R. § 64.1200(k) provides that voice
 20 service providers may block calls so that they do not reach a called party when the calls
 21 purport to originate from:

22 A. Numbers where the subscriber of the originating number has
 23 requested that calls purporting to originate from that number be blocked

1 because the number is used for inbound calls only (Do Not Originate list
 2 numbers);

3 B. Numbers that are not valid under the North American Numbering Plan
 4 (“NANP”);

5 C. Valid NANP numbers that are not allocated to a provider by the
 6 NANP Administrator or Pooling Administrator; and

7 D. Valid NANP numbers that are allocated to a provider by NANP or the
 8 Pooling Administrator *but* are unused, so long as the provider blocking the
 9 calls is allocatee of the number and confirms that the number is unused or
 10 has obtained verification from the allocatee that the number is unused at the
 11 time of the blocking.

12 14. TCPA rule 47 C.F.R. § 64.1200(n)(3) provides that a voice service provider
 13 must take affirmative, effective measures to prevent new and renewing customers from
 14 using its network to originate illegal calls, including knowing its customers and exercising
 15 due diligence in ensuring that its services are not used to originate illegal traffic.¹

16 15. Defendants did not choose to regularly, if at all, block calls made from
 17 telephone numbers that the FCC has authorized could be blocked so that those calls do not
 18 reach a called party pursuant to 47 C.F.R. § 64.1200(k).

19 16. Defendants violated 47 C.F.R. § 64.1200(n)(3) by failing to take affirmative,
 20 effective measures to prevent new and renewing customers from using its network to
 21 originate illegal calls, including knowing its customers and exercising due diligence in
 22 ensuring that its services are not used to originate illegal traffic.

23 17. As with Count I, the Plaintiffs bear the burden of proving the elements of this
 24 TSR violation by a preponderance of the evidence. See para.7.

25 ¹ *In the Matter of Lingo Telecom, L.L.C., Notice of Apparent Liability for Forfeiture,*

26 File No. EB-TCD-24-00036425 (rel. May 28, 2024).

1 **COUNT III – By All Plaintiffs**

2 **Violations of the Federal TCPA – 47 U.S.C. §§ 227(b)(1)(A)(iii) and (b)(1)(B)**
3 **and its implementing rule, 47 C.F.R. §§ 64.1200(a)(2) and (a)(3)**
4 **(Robocalls to Cellular and Residential Telephone Lines)**

5 18. Plaintiffs allege that Defendants violated the TCPA under 47 U.S.C.
6 §§ 227(b)(1)(B) and (b)(1)(A)(iii) by engaging in a pattern or practice of initiating
7 telephone calls to residential telephone lines and cellular telephone lines using artificial or
8 prerecorded voices to deliver messages without the prior express written consent of the
9 called party.

10 19. Plaintiffs further allege Defendants violated TCPA rule, 47 C.F.R.
11 § 64.1200(a)(2), by engaging in a pattern or practice of initiating or causing telephone calls
12 to be initiated that include or introduce advertisements or constitute telemarketing to
13 cellular telephone lines using artificial or prerecorded voices to deliver messages without
14 the prior express written consent of the called parties.

15 20. Plaintiffs further allege Defendants violated TCPA rule, 47 C.F.R.
16 § 64.1200(a)(3), by engaging in a pattern or practice of initiating telephone calls to
17 residential telephone lines using artificial or prerecorded voices to deliver messages
18 without the prior express written consent of the called parties.

19 21. The TCPA states that it is a violation for any person within the United States
20 to “make any call (other than a call made for emergency purposes or made with the prior
21 express consent of the called party) using...an artificial or prerecorded voice” to any
22 “cellular telephone service.” 47 U.S.C. § 227(b)(1)(A). *Burke v. Direct Energy, LP*, 2021
23 U.S. Dist. LEXIS 178408, *2 (S.D. Tex. Sept. 20, 2021).

24 22. The TCPA states that “[i]t shall be unlawful for any person within the United
25 States, or any person outside the United States if the recipient is within the United
26 States...to initiate any telephone call to any residential telephone line using an artificial or
27 prerecorded voice to deliver a message without the prior express consent of the call party,
28 unless the call is initiated for emergency purposes....” 47 U.S.C § 227(b)(1)(B).

1 23. The TCPA prohibits the initiation of telephone solicitations to cellular
 2 telephone lines using artificial or prerecorded voices. *Mims v. Arrow Fin. Servs., LLC*, 565
 3 U.S. 368, 373 (2012); *Lester v. Wells Fargo Bank N.A.*, 805 Fed Appx. 288, 289 (5th Cir.
 4 2020); *Ybarra v. Dish Network, L.L.C.*, 807 F. 3d 635, 640 (5th Cir. 2015); *Thomas*, 559
 5 F. Supp. 3d at 562-63 (multiple unwanted phone calls with prerecorded messages give rise
 6 to a concrete injury under the TCPA). Cellular phones were added to TCPA coverage in
 7 2015 when the FCC recognized that the invasion of privacy from an unwanted call may be
 8 greater “where the calls are received on a phone that the consumer may carry at all times.”
In the Matter of Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991,
 9 30 FCC Rcd. 7961, ¶124 (2015).

10 24. “The three elements of a TCPA claim [under Section 227(b)(1)] are: (1) the
 11 defendant called a cellular telephone number; (2) using an automatic telephone dialing
 12 system [or an artificial or prerecorded voice]; (3) without the recipient’s prior express
 13 consent.” *Shields v. Gawk Inc.*, No. 3:18-CV-00150, 2019 WL 1787781, at *3 (S.D. Tex.
 14 Apr. 24, 2019), *report and recommendation adopted*, No. 3:18-CV-00150, 2019 WL
 15 2103423 (S.D. Tex. May 14, 2019) (quoting *Meyer v. Portfolio Recovery Assocs., LLC*,
 16 707 F.3d 1036, 1043 (9th Cir. 2012). The same analysis would apply to calls made to
 17 residential lines. 47 C.F.R. § 64.1200(a)(3). The burden of proving a call was made with
 18 the prior express consent of the called party lies with the seller or telemarketer. An
 19 exemption from the general rule is treated as an affirmative defense for which the party
 20 asserting the defense bears the burden of proof. *Shaffer ex rel. Schaffer v. Weast*, 546 U.S.
 21 49, 126 S. Ct. 528, 534, 163 L. Ed. 2d 387 (2005) (burden of proof shifts to defendant when
 element can be fairly characterized as an exemption); *Tourgeman v. Nelson & Kennar*, 900
 F.3d 1105 (9th Cir. Cal. 2018.).

22 25. “To be liable under the ‘artificial or prerecorded voice’ section of the TCPA,
 23 under Section 227(b)(1), a defendant must make a call and an artificial or prerecorded voice
 24 must actually play.” *Ybarra v. Dish Network, L.L.C.*, 807 F.3d 635, 640 (5th Cir. 2015).

1 “With a prerecorded voice, though, unless the recipient answers, an artificial or prerecorded
 2 voice is never used.” *Id.* at 641.

3 26. While the TCPA nor its rules define what it means to make or initiate
 4 telephone calls, ‘one can violate the TCPA either by taking the steps necessary to
 5 physically place a telephone call, or by being so involved in the placing of a specific
 6 telephone call as to be deemed to have initiated it.’ (quoting *Mey v. All Access Telecom,*
Inc., No. 5:19-CV-00237-JPB, 2021 WL 8892199, at *4 (Va. Apr. 23, 2021) (citing Rules
 7 & Regs. Implementing the Tel. Consumer Prot. Act of 1991, 30 FCC Red. 7961, 7890
 (2015) (the “2015 FCC Order”)).

8 27. In determining whether a party “initiated” a call, the 2015 FCC Order
 9 instructs courts to look at ‘the totality of the facts and circumstances surrounding the
 10 placing of a particular call to determine: 1) who took the steps necessary to physically place
 11 the call; and 2) whether another person or entity was so involved in placing the call as to
 12 be deemed to have initiated it.’ *Id.* (citing 2015 FCC Order at ¶ 30). With the respect to
 13 this second prong, the FCC further states for those that offer calling platform services to
 14 others to use, it will also consider as a factor whether they “knowingly allowed its client(s)
 15 to use that platform for unlawful purposes.” *Id.* The FCC Order identifies several relevant
 16 factors, such as: “‘the extent to which a person willfully enables fraudulent spoofing of
 17 telephone numbers’ and knowingly allowing the use of a platform for unlawful purposes.”
Id., see also *Off. of the Att'y Gen. v. Smartbiz Telecom LLC*, No. 1:22-CV-23945-JEM,
 18 2023 WL 5491835 at *4 (Fla. Aug. 23, 2023); *Mey*, 2021 WL 8892199 at *5; *Hurley v.
 Messer*, No. CV 3:16-9949, 2018 WL 4854082, at *4 (Va. Oct. 4, 2018) (finding that
 19 alleging the ability to stop illegal use of VoIP services, and the failure to take action to do
 20 so, states a claim under the TCPA).

21 28. Additionally, factors can include: “[t]he extent to which the defendant
 22 controls the call’s message”; “[t]he extent to which the defendant controls the timing or
 23 initiation of the call”; “[t]he extent to which the defendant controls who receives the call.”
Cunningham v. Montes, 378 F.Supp.3d 741, 747–48 (W.D. Wis. 2019).

29. A person or entity, including a common carrier, can also be liable under the TCPA if they provide “transmission facilities” and demonstrate “a high degree of involvement or actual notice of an illegal use and failure to take steps to prevent such transmissions.” *In the Matter of Rules & Reguls. Implementing the Tel. Consumer Prot. Act of 1991*, 7 F.C.C. Red. 8752, ¶54 (1992).

30. “[A]n officer may be personally liable under the TCPA if he had direct, personal participation in or personally authorized the conduct found to have violated the statute, and was not merely tangentially involved. Individuals who directly (and here, knowingly and wilfully) [sic] violate the TCPA should not escape liability solely because they are corporate officers.” *Texas v. Am. Blastfax, Inc.*, 164 F. Supp. 2d 892, 898 (W.D. Tex. 2001).

31. Many “courts have held that corporate actors can be individually liable for violating the TCPA where they had direct, personal participation in or personally authorized the conduct found to have violated the statute.” *Cunningham v. Britereal Management, Inc.*, No. 4:20-CV-144, 2020 WL 7391693, at *5–6 (E.D. Tex. Nov. 20, 2020), *adopted*, 2020 WL 7388415 (E.D. Tex. Dec. 16, 2020)). “If an individual acting on behalf of a corporation could avoid individual liability, the TCPA would lose much of its force.” *Maryland v. Universal Elections*, 787 F. Supp. 2d 408, 415–16 (D. Md. 2011).

COUNT IV – By All Plaintiffs

**Violations of the Federal TCPA – 47 U.S.C. §§ 227(c) and its
implementing rule, 47 C.F.R. § 64.1200(c)(2)**
(Calls to Telephone Numbers on the National DNC Registry)

32. Plaintiffs allege that Defendants violated the TCPA by engaging in a pattern or practice of initiating telephone solicitations to residential telephone subscribers whose telephone numbers were listed on the National Registry in violation of 47 U.S.C. § 227(c) and 47 C.F.R. § 64.1200(c)(2).

1 33. The FCC Rule provides that “(c) No person or entity shall initiate any
 2 telephone solicitation, as defined in paragraph (f)(12) of this section, to...(2) A residential
 3 telephone subscriber who has registered his or her telephone number on the national do not
 4 call registry of persons who do not wish to receive telephone solicitations that is maintained
 5 by the Federal Government.” 47 C.F.R. § 64.1200(c)(2). Sellers and telemarketers must
 6 honor the registration as long as the number remains on the National Registry. *Id.*
 Consumers may add their wireless telephone numbers to the National Registry, as well as
 their residential land lines. 47 C.F.R. § 64.1200(e).

7 34. To prevail on a TCPA count under 47 U.S.C. § 227(c), the plaintiff must
 8 show that the call recipient (1) is a residential telephone subscriber who (2) registered that
 9 telephone number with the Do Not Call Registry, and (3) nonetheless received an
 10 unsolicited call to that number initiated by a person or entity. 47 C.F.R. § 64.1200(c)(2).
Lyman v. QuinStreet, Inc., No. 23-CV-05056-PCP, 2024 WL 3406992, at *3 (N.D. Cal.
 July 12, 2024).

11 35. The National Registry was established in 2003 to enable individuals to avoid
 12 receiving unwanted telemarketing calls. 47 C.F.R. § 64.1200(c)(2) prohibits making a
 13 telemarketing call to a number listed on the National Registry without having an
 14 established business relationship with the telephone subscriber. *Thomas v. Life Protect
 24/7 Inc.*, 559 F. Supp. 3d 554, 448 (S.D. Tex. 2021); *Cunningham v. Mark D. Guidubaldi
 & Assoc.*, 2019 U.S. Dist. LEXIS 38652, *4, adopted by, 2019 U.S. Dist. LEXIS 170945
 (E.D. Tex. Jan. 11, 2019). The established business relationship provision is written as an
 17 exemption to the general rule. An exemption from the general rule is treated as an
 affirmative defense for which the party asserting the defense bears the burden of proof.
Shaffer ex rel. Schaffer v. Weast, 546 U.S. 49, 126 S. Ct. 528, 534, 163 L. Ed. 2d 387
 (2005) (burden of proof shifts to defendant when element can be fairly characterized as an
 19 exemption); *Tourgeman v. Nelson & Kennar*, 900 F.3d 1105 (9th Cir. Cal. 2018.).

20

21

36. The established business relationship exemption for calls made to telephone numbers on the Registry is inapplicable for callers initiating prerecorded telemarketing calls. 47 U.S.C. § 227(b).

37. It is not necessary for the Plaintiffs to prove that the calls were made to the person who registered the number on the National Registry, merely that the number is on the Registry. *United States v. Dish Network LLC*, 75 F. Supp 3d 916,936 (C.D. Ill. Dec. 11, 2014).

38. As the Plaintiffs alleged multiple violations of the TCPA and its implementing rules, the basic standards of proof related to TCPA claims are the same such that, paragraphs 26 through 31 also apply to this count.

COUNT V – By All Plaintiffs

Violations of the Federal Truth in Caller ID Act – 47 U.S.C. § 227(e)

(Prohibition Against Spoofing)

39. The TCPA, 47 U.S.C. § 227(e)(1) and 47 C.F.R. § 64.1604(a), prohibit any person or entity within the United States, or any person or entity outside the United States if the recipient is within the United States, with the intent to defraud, cause harm, or wrongfully obtain anything of value, from knowingly causing, directly or indirectly, any caller identification service to transmit misleading or inaccurate caller identification information in connection with any voice service or text messaging service.

40. In enforcement actions, the FCC has found that when an entity spoofs a large number of calls in a robocall campaign, it causes harms to the subscribers of the numbers that are spoofed, the consumers who receive the spoofed calls, and the terminating providers forced to deliver calls to consumers and handle the “consumers’ ire,” thereby increasing their costs.²

² John C. Spiller et al., File No.: EB-TCD-18-0027781, Notice of Apparent Liability for Forfeiture, 35 FCC Rcd 5948, 5957-61, paras 23-33 (2020).

1 41. The FCC has further held when spoofing is done in conjunction with an
 2 illegal robocalling campaign—itself a harmful practice—it indicates an intent to cause
 3 harm.³

4 42. Defendants violated 47 U.S.C. § 227(e)(1) and 47 C.F.R. § 64.1604(a) by
 5 knowingly causing the caller identification services of the recipients of their call traffic
 6 with spoofed phone numbers to transmit misleading or inaccurate caller identification
 7 information.

8 43. Defendants knew or should have known that they accepted and profited from
 9 illegal robocalls with misleading or inaccurate spoofed phone numbers, which sought to
 10 defraud, cause harm, or wrongfully obtain things of value from the call recipients.

11 44. As this count is also codified in the TCPA, Plaintiffs believe the same
 12 standards will apply to determine whether Defendants can be deemed to have “initiated”
 13 calls at issue, as well as whether the individual defendant can be held personally liable and
 14 as such, paragraphs 26 through 31 are restated as applicable to this Count. In determining
 15 whether a party “initiated” a call, the 2015 FCC Order instructs courts to look at ‘the totality
 16 of the facts and circumstances surrounding the placing of a particular call to determine: 1)
 17 who took the steps necessary to physically place the call; and 2) whether another person or
 18 entity was so involved in placing the call as to be deemed to have initiated it.’ 2015 FCC
 19 Order at ¶ 30. Specifically, the FCC noted that one of the factors to consider is the extent
 20 to which a person willfully enables fraudulent spoofing of telephone numbers or assists
 21 telemarketers in blocking Caller ID, by offering either functionality to clients, can be
 relevant in determining liability for TCPA violations.

³ *Roesel Notice of Apparent Liability*. 33 FCC Rcd at 9218-19, para. 40.

COUNT VI – By State of California

Violations of Business and Professions Code Section 17200 (Unfair Competition)

45. Plaintiff, the People of the State of California, allege Count VI for violations of California Business and Professions Code § 17200 et seq., California’s Unfair Competition Law (UCL). The People of the State of California allege that Defendants violated the UCL because they violated the Telemarketing Sales Rule (“TSR”) and the Telephone Consumer Protection Act (“TCPA”). As a result, the People of the State of California allege that Defendants may be enjoined and must be found liable for civil penalties under California Business and Professions Code §§ 17204 and 17206, respectively.

The UCL.

46. California's UCL prohibits "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." Cal. Bus. & Prof. Code § 17200. To bring a UCL claim, "a plaintiff must show either an (1) unlawful, unfair, or fraudulent business act or practice or (2) unfair, deceptive, untrue or misleading advertising." *Lippitt v. Raymond James Fin. Servs., Inc.*, 340 F.3d 1033, 1043 (9th Cir. 2003) (citing *Cel-Tech Comm'nns, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 180, 83 Cal.Rptr.2d 548, 973 P.2d 527 (1999)). Because the text "is written in the disjunctive," an act or practice may be challenged if it fits within any one of these three prongs of unfair competition – unlawful, unfair, or fraudulent. *Id.*

Violations of the TSR and TCPA are Violations of the Unlawful Prong of the UCL.

47. Unlawful business activity includes “anything that can properly be called a business practice and that at the same time is forbidden by law.” *Nat'l Rural Telecommunications Co-op. v. DIRECTV, Inc.*, 319 F. Supp. 2d 1059, 1074 (C.D. Cal. 2003). “The ‘unlawful’ practices prohibited by the UCL ‘are any practices forbidden by law, be it civil or criminal, federal, state, or municipal, statutory, regulatory or court-

1 made.”” *Id.* “By proscribing ‘any unlawful’ business practice, ‘section 17200 “borrows”

2 violations of other laws and treats them as unlawful practices’ that the unfair competition

3 law makes independently actionable.” *City & Cnty. of San Francisco v. Purdue Pharma*

4 *L.P.*, 491 F. Supp. 3d 610, 684 (N.D. Cal. 2020) (citing *Cel-Tech Comm’ns, Inc.*, 83

Cal.Rptr.2d 548 at 180).

5 Injunction and Civil Penalties.

6 48. In bringing an enforcement action under the UCL, the California Attorney

7 General is authorized to seek multiple remedies, including injunctive relief and civil

8 penalties. Cal. Bus. & Prof. Code §§ 17204 and 17206.

9 **COUNT VII – By the State of Florida**

10 **Violations of Chapter 501, Part II, Florida Statutes**

11 49. Plaintiff, State of Florida, Office of the Attorney General, Department of

12 Legal Affairs (“State of Florida”) brings Count VII for violations of Chapter 501, Part II,

13 Florida Statutes (“FDUTPA”). The State of Florida’s claim encompasses three legal

14 theories. First, Defendants violated the Telemarketing Sales Rule (“TSR”) and those

15 violations are defined as violations of FDUTPA. Second, the State of Florida alleges that

16 Defendants violated FDUTPA’s prohibition on deceptive trade practices. Third, the State

17 of Florida alleges that Defendants violated FDUTPA’s prohibition on unfair trade

18 practices. Finally, the State of Florida alleges that under any of these three theories

19 Defendants may be enjoined and may be liable for civil penalties if their conduct was

20 willful. The elements of each theory, in turn, are as follows.

21 Violations of the TSR are Defined as FDUTPA Violations.

22 50. The FDUTPA defines a “violation of this part” to include violations of “[a]ny

23 rules promulgated pursuant to the Federal Trade Commission Act.” § 501.203(3), Florida

24 Statutes. The TSR’s enabling statute is the Telemarketing and Consumer Fraud and Abuse

1 Prevention Act (15 U.S.C. §§ 6101-08). Under 15 U.S.C. § 6102(c)(1), violations of the
 2 TSR are treated as violations of rules passed under the Federal Trade Commission Act (15
 3 U.S.C. § 57a). Violations of rules passed under the FTC Act are unfair and deceptive within
 4 the scope of 15 U.S.C. § 45, as set forth in 15 U.S.C. § 57a(d)(3) liability are coextensive
 5 with the elements of Count I, as set forth above.). *See also United States v. Dish Network,*
 6 *L.L.C.*, 75 F. Supp. 3d 942, 1004 (C.D. Ill. 2014) (“A violation of the TSR constitutes an
 7 unfair and deceptive act or practice in violation of § 5(a) of the [Federal Trade
 Commission] Act.”). Therefore, the elements of the State of Florida’s first theory of
 liability are coextensive with the elements of Count I, as set forth above.

8 Deceptive Trade Practices in Violation of FDUTPA.

9 51. Under FDUTPA, a deceptive trade practice is one which is “likely to deceive
 10 a consumer acting reasonably in the same circumstances.” *Coleman v. CubeSmart*, 328 F.
 11 Supp. 3d 1349, 1361 (S.D. Fla. 2018) (quoting *Carriuolo v. Gen. Motors Co.*, 823 F.3d
 12 977, 983 (11th Cir. 2016)).⁴ Whether a practice is likely to mislead is determined based on
 13 the net impression it creates on a reasonable consumer. *FTC v. RCA Credit Servs., LLC*,
 14 727 F. Supp. 2d 1320, 1329 (M.D. Fla. 2010). *See also Matter of Cliffdale Assocs., Inc.*,
 15 103 F.T.C. 110 (1984); *Fed. Trade Comm'n v. On Point Glob. LLC*, No. 19-25046-CIV,
 16 2021 WL 4892228, at *8 (S.D. Fla. Sept. 29, 2021) (“the term ‘deceptive’ is meant to be
 17 ‘flexible,’ and courts must look to the ‘overall, net impression rather than the literal truth
 18 or falsity of the words.’”) (quoting *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 384–85
 19 (1965)).

20 ⁴ FDUTPA state that in construing unfair and deceptive trade practices, “due
 21 consideration and great weight shall be given to the interpretations of the Federal Trade
 Commission and the federal courts” relating to the Federal Trade Commission Act, 15
 U.S.C. s. 45(a)(1). § 501.204(2).

Unfair Trade Practices in Violation of FDUTPA.

52. Under FDUTPA, and unfair trade practices is one which 1) causes risk of substantial injury, that 2) must not be outweighed by any countervailing benefits to consumers or competition that the practice produces, and 3) must be an injury that consumers themselves could not reasonably have avoided. *Porsche Cars N. Am., Inc. v. Diamond*, 140 So. 3d 1090, 1096 (Fla. Dist. Ct. App. 2014).

Injunction and Civil Penalties.

53. When seeking injunctive and other statutory relief, the Attorney General need not establish actual damages, irreparable harm, lack of an adequate legal remedy, or that an injunction is in the public interest, and need only show a clear right to an injunction by establishing that Defendant's practices violate FDUTPA. *Off. of Att'y Gen. v. Bilotto*, 267 So. 3d 1, 3 (Fla. Dist. Ct. App. 2019). Under FDUTPA, civil penalties may be imposed against "any person, firm, corporation, association, or entity, or any agent or employee of the foregoing, who is willfully using, or has willfully used, a method, act, or practice declared unlawful under s. 501.204." § 501.2075, Fla. Stat. "Willful violations occur when the person knew or should have known that his or her conduct was unfair or deceptive or prohibited by rule." § 501.2075, Florida Statutes.

COUNT VIII - By the State of Indiana

Violations of the Telephone Solicitation of Consumers Act (the “TSCA”)

Indiana Code 24-4.7-4

54. To make a showing that Defendants violated Indiana's Telephone Solicitation of Consumers Act ("TCSA"), Plaintiff State of Indiana will need to show that Defendants provided substantial assistance or support to a "telephone solicitor, a supplier, or a caller" that violated the TSCA. Further, Plaintiff State of Indiana will need to show that Defendants knew or consciously avoided knowing that the "telephone solicitor, a supplier, or a caller" was violating the TSCA.

1 55. As Defendants already admitted that Defendant Avid Telecom had not
2 applied for a Certificate of Territorial Authority (“CTA”) with Indiana’s Utility Regulatory
3 Commission, thus Plaintiff has a lower burden of proof in showing that Defendants
4 provided substantial assistance or support. See Ind. Code § 24-4.7-4-7(e).

5 56. Ind. Code § 24-4.7-4-7(e) prohibits that a “person may not provide
6 substantial assistance or support to a telephone solicitor, a supplier, or a caller if the person
7 knows or consciously avoids knowing that the telephone solicitor, supplier, or caller has
8 engaged in any act or practice that violates” the TSCA.

9 57. Further, “A telephone solicitor, a supplier, or a caller may not provide
10 substantial assistance or support to another person if the telephone solicitor, supplier, or
11 caller knows or consciously avoids knowing that the person has engaged in any act or
12 practice that violates” the TSCA. Ind. Code § 24-4.7-4-7

13 58. Ind. Code. § 24-4.7-2-1.7 defines caller as an individual or entity that
14 attempts to contact or contacts a “a subscriber in Indiana by using a telephone or telephone
15 line.” Ind. Code § 24-4.7-2-5 defines “doing business in Indiana” as making or causing
16 other to make “telephone sales calls to consumers located in Indiana whether the telephone
17 sales calls are made from a location in Indiana or outside Indiana.” Further, a person that
18 controls, directly or indirectly, one or more persons to make or cause to make telephone
19 calls to “a consumer located in Indiana is “doing business in Indiana”, no matter where the
20 person is located or domiciled.”

21 59. 11 IAC 1-1-7 defines “residential telephone subscriber” as an individual who
22 subscribes to or for another person with the individual’s residential address, including: a
23 landline, wireless, or interconnected VoIP.

24 60. Ind. Code § 24-4.7-2-7 defines “listing” as “the no telephone sales
25 solicitation listing published by the division under IC 24-4.7-3 that lists the telephone
26 numbers of consumers who do not wish to receive telephone sales calls.”

1 61. Ind. Code § 24-4.7-2-4 defines “division” as “the consumer protection
2 division of the office of the attorney general.” Indiana’s Do Not Call List can be found
3 here: <https://www.indonotcall.org/>.

4 62. Under the TSCA, a telephone solicitor may not make or cause others to make
5 a telephone sales call to an Indiana consumer’s telephone number that appears on the most
6 current quarterly Indiana Do Not Call List. Ind. Code § 24-4.7-4-1.

7 63. A “telephone sales call” is a telephone call made to a consumer for the
8 solicitation of consumer goods or services or a telephone call to obtain information that
9 may be used for the direct solicitation of consumer goods or services. This includes the use
10 of a recorded message device. Ind. Code § 24-4.7-2-9.

11 64. Indiana law does not directly define "consciously avoids knowing" and
12 "substantial assistance." Ind. Code § 24-4.7-4-7(e) is nearly identical to the Telemarketing
13 Sales Rule's ("TSR") assisting and facilitating provision. See 16 C.F.R. § 310.3(b) ("It is a
14 deceptive telemarketing act or practice and a violation of this Rule for a person to provide
15 substantial assistance or support to any seller or telemarketer when that person knows or
16 consciously avoids knowing that the seller or telemarketer is engaged in any act or practice
17 that violates . . . this Rule.").

18 65. In defining “substantial assistance,” courts have defined it as requiring more
19 than casual or incidental help to a telemarketer. See 16 C.F.R. § 310.3(b); *FTC v. Chapman*,
20 714 F.3d 1211, 1216 (10th Cir. 2013) (quoting FTC, Complying with the Telemarketing
21 Sales Rule, available at <http://business.ftc.gov/documents/bus27-complying-telemarketing-sales-rule#assisting> (Feb. 2011)); *Consumer Financial Protection Bureau v. Nesheiwat*, No. 21-56052, 2022 WL 17958636, at *1 (9th Cir. Dec. 27, 2022); *FTC v. Consumer Health Benefits Ass'n*, No. 10-CV-3551 (ILG), 2011 WL 3652248, at *5
(E.D.N.Y. Aug. 18, 2011) (quoting Telemarketing Sales Rule, 60 Fed. Reg. 43842-01,
43852 (Aug 23, 1995)). There must be some link between the third party’s actions and the
telemarketer, but not necessarily a direct connection. See *Chapman*, 714 F.3d at 1216. For
example, someone who provides lists of contacts to a seller or telemarketer, drafts the

language used for telemarketing, or makes available incentives to be used in the telemarketing, provides substantial assistance. See Statement of Basis and Purpose and Final Rule, Telemarketing Sales Rule, 60 Fed. Reg. 43,842, 43,852 (Aug. 23, 1995).

66. A person consciously avoids knowing about a violation when “there are facts and evidence that support an inference of deliberate ignorance.” Statement of Basis and Purpose and Final Rule, Telemarketing Sales Rule, 60 Fed. Reg. 43,842, 43,852 n.106 (Aug. 23, 1995) (citing *United States v. Williams*, 32 F.3d 570, at *6 (7th Cir. 1994)); see *FTC v. Chapman*, 714 F.3d 1211, 1219 (10th Cir. 2013) (quoting FTC, Complying with the Telemarketing Sales Rule, available at <https://www.ftc.gov/business-guidance/resources/complying-telemarketing-sales-rule> (Feb. 2011)) (“[T]aking deliberate steps to ensure one's own ignorance of a seller or telemarketer's Rule violations is an ineffective strategy to avoid liability.”). Knowledge can be inferred from a combination of suspicion and indifference to the truth. See *United States v. Salinas*, 763 F.3d 869, 875 (7th Cir. 2014) (discussing the “ostrich instruction”); *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 769 (2011) (finding that a willfully blind defendant takes deliberate actions to avoid confirming a high probability of wrongdoing). Further, “knowledge of the agent is imputed to the principal.” *United States v. Dish Network L.L.C.*, 954 F.3d 970, 978 (7th Cir. 2020).

67. Further, the Attorney General may obtain these remedies separately against or from each person that violates the Ind. Code § 24-4.7-4-1, including a person that directly or indirectly controls a person that violates Ind. Code § 24-4.7-4-1.

COUNT IX – By the State of Maryland

Violations of the Maryland Telephone Consumer Protection Act, Md. Code Ann.,
Com. Law § 14-3201, *et seq.*

68. The claims brought by Maryland are pursuant to the §§ 14-3201(1) and (2) of Maryland Telephone Consumer Protection Act, Md. Code Ann., Com. Law § 14-3201, *et seq.*, which simply incorporates under state law the protections that exist under the

1 Telemarketing under and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. §§ 6101
 2 through 6108, as implemented by the Federal Trade Commission in the Telemarketing
 3 Sales Rule (16 C.F.R. Part 310) and the Telephone Consumer Protection Act, 47 U.S.C. §
 4 227, as implemented by the Federal Communications Commission in the Restrictions on
 Telemarketing and Telephone Solicitations Rule (47 C.F.R. Part 64, Subpart L).

5 **COUNT X – By the State of Nevada**

6 **Violations of the Nevada Telecommunication Solicitation Act**

7 **Chapter 228.500 to 228.590**

8 69. The Nevada Telecommunication Solicitation Act (“NTSA”), Nevada
 Revised Statutes (“NRS”) Chapter 228.500 to 228.590, also known as Nevada’s Do Not
 Call Law, prohibits telephone solicitors from making unsolicited telephone calls for the
 sale of goods or services to a telephone number on Nevada’s registry.

9 70. Under NRS 228.520, a “telephone solicitor” means a person who makes or
 causes another person or a machine to make an unsolicited telephone call for the sale of
 10 goods or services.

11 71. Under NRS 228.530(a)-(d), an “unsolicited telephone call for the sale of
 12 goods or services” means an unsolicited telephone call, other than a telephone call on
 behalf of a charitable organization, religious organization or political organization, to (a)
 13 Rent, lease, sell, exchange, promote or gift any good or service; (b) Solicit any act
 described in paragraph (a); (c) Seek or obtain a donation or contribution of money or
 14 anything else of value; or (d) Seek or obtain information, including, without limitation,
 15 any document, intended to be used to facilitate any act described in paragraph (a), (b) or
 16 (c).

17 72. Plaintiff State of Nevada alleges and affirms that Defendants violated the
 18 NTSA by intentionally making unsolicited telephone calls for the sale of goods or services
 19 to telephone numbers in the currently effective version of the list of telephone numbers in
 20 the registry. NRS 228.590.

73. Additionally, pursuant to NRS 228.620, a violation of the NTSA constitutes a deceptive trade practice for the purposes of NRS 598.0903 to 598.0999, inclusive, in violation of NDTPA. As such, Plaintiff State of Nevada alleges and affirms that Defendants, by violating the NTSA, have also committed a deceptive trade practice for the purposes of NDTPA.

74. Furthermore, a person's intent to "knowingly" violate the NDTPA, NRS chapter 598, does so by being aware that the facts exist that constitute the act or omission. *Poole v. Nevada Auto Dealership Invs., LLC*, 135 Nev. 280, 284, 449 P.3d 479, 483 (Nev. App. 2019).

COUNT XI – By the State of Nevada

Violations of the Nevada Law – Devices for Automatic Dialing and Announcing

Chapter 597 et seq.

75. Under Nevada Revised Statute (NRS) 597.814, a person is prohibited from using a device for automatic dialing and announcing to disseminate a prerecorded message in a telephone call.

76. To make a showing that Defendants violated NRS 597.814(1), Plaintiff State of Nevada will show Defendants used a device for automatic dialing and announcing in their use of any equipment that (1) incorporates a storage capability of telephone numbers to be called and utilizes a random or sequential number generator producing telephone numbers to be called and (2) used exclusively, working alone or in conjunction with other equipment, to disseminate a prerecorded message to the telephone number called to solicit a person at the telephone number called to purchase goods or services. *See* NRS 597.812.

77. Under NRS 597.814(1), Plaintiff State of Nevada will show that Defendants disseminated a prerecorded message in a telephone call which was not preceded by a recorded or unrecorded natural voice that (1) informed the person who answers the telephone call of the nature of the call, including, without limitation, the fact that a device for automatic dialing and announcing will be used to disseminate the message if the person

1 who answers the call remains on the line; and (2) provides to the person who answers the
 2 telephone call the name, address and telephone number of the business or organization, if
 3 any, being represented by the caller.

4 78. Under NRS 597.814(2), a person is prohibited from operating a device for
 5 automatic dialing and announcing to place a call-back or second call to the same telephone
 6 number if the person at the telephone number terminated the original call. Plaintiff State
 7 of Nevada will show Defendants violated NRS 597.814(2) by placing call-backs or second
 8 calls.

COUNT XII – By the State of Nevada

Violations of the Nevada Deceptive Trade Practices Act, Chapter 598 *et seq.*

9 79. Under NRS 598.0916, a person engages in a deceptive trade practice when,
 10 in the course of his or her business or occupation, he or she disseminates an unsolicited
 11 prerecorded message to solicit a person to purchase goods or services by telephone and he
 12 or she does not have a preexisting business relationship with the person being called unless
 13 a recorded or unrecorded natural voice informs the person who answers the telephone call
 14 of the nature of the call, and provides to the person who answers the telephone call the
 15 name, address and telephone number of the business or organization, if any, represented
 16 by the caller.

17 80. Pursuant to NRS 598.0918(2), a person engages in a deceptive trade practice
 18 when, in the course of his or her business or occupation, he or she repeatedly or
 19 continuously conducts the solicitation or presentation in a manner that is considered by a
 20 reasonable person to be annoying, abusive, or harassing.

21 81. Pursuant to NRS 598.0923(1)(c), a person engages in a deceptive trade
 22 practice when in the course of his or her business or occupation, he or she knowingly
 23 violates a state or federal statute or regulation related to the sale or lease of goods or
 24 services. In *Poole v. Nevada Auto Dealership Invs., LLC*, the Nevada Court of Appeals
 25 “conclude[ed] that a “knowing[]” act or omission under the NDTPA does not require that

1 the defendant intend to deceive with the act or omission, or even know of the prohibition
2 against the act or omission, but simply that the defendant is aware that the facts exist that
3 constitute the act or omission.” *Poole v. Nevada Auto Dealership Invs., LLC*, 135 Nev. 280,
284, 449 P.3d 479, 483 (Nev. App. 2019).

4 82. Defendants’ conduct in transmitting fraudulent robocalls to consumers in
5 Nevada is in violation of provisions of Federal law, including without limitation, the
6 Telemarketing Sales Rule, 16 C.F.R. Part 310 via 15 U.S.C. § 6103(a) and provisions of
federal law identified herein.

7 83. Defendants knowingly violated the laws set forth in paragraph 14, above,
8 because Defendants knew or should have known that the robocalls were in violation of
those laws.

9 84. Pursuant to NRS 598.0923(1)(e), a person engages in a deceptive trade
10 practice when in the course of his or her business or occupation, he or she knowingly uses
an unconscionable practice in a transaction.

11 85. Defendants took advantage of the lack of knowledge, ability, experience or
12 capacity of Nevada consumers to a grossly unfair degree by transmitting calls and carrying
13 out attendant acts regarding those calls as alleged herein, thereby committing an
unconscionable practice in a transaction in violation of NRS 598.0923(1)(e).

14 86. Defendants’ violations of the Nevada Do Not Call Law, and/or the NDTPA,
15 and/or other statutory provisions as alleged herein, are subject to injunctions and/or
16 restitution and/or civil penalties and/or damages and/or its costs and attorney’s fees
pursuant to NRS 597.818, 598.0963, and 598.0999.

17 87. Under NRS 597.818, a person who uses a device for automatic dialing and
18 announcing in violation of NRS 597.814, is guilty of (a) a misdemeanor for a first offense,
19 (b) a gross misdemeanor for a second offense, and (c), a category E felony and shall be
punished as provided in NRS 193.130 for a third and any subsequent offense. *See* NRS
20 597.818(1). In addition to any other penalty, a person who violates any provision of NRS
21 597.814 is subject to a civil penalty of not more than \$10,000 for each violation. *See* NRS

597.818(3). Furthermore, a violation of any provision of NRS 597.814 constitutes a deceptive trade practice for the purposes of NRS 598.0903 to 598.0999, inclusive. See NRS 597.818(4).

88. Where “the Attorney General has reason to believe that a person has engaged or is engaging in a deceptive trade practice the State may bring an action for a permanent injunction under NRS 598.0963(3). Additionally, NRS 598.0963(3) allows for a permanent injunction based upon either past or ongoing violations. *Id.*

89. Under NRS 598.0999(2), “if the court finds that a person has willfully engaged in a deceptive trade practice... the Attorney General bringing the action may recover a civil penalty not to exceed \$15,000 for each violation.” Furthermore, the court in any such action may, in addition to any other relief or reimbursement, award reasonable attorney’s fees and costs. *Id.*

90. Defendants' violations of the NDTPA are further subject to additional penalties for acts committed against consumers in Nevada over the age of 60 or disabled consumers pursuant to NRS 598.0973. For a deceptive trade practice directed toward an elderly person not more than \$25,000 for each violation shall be imposed. *See* NRS 598.0973(b). For a deceptive trade practice directed toward a person with a disability, not more than \$15,000 for each violation shall be imposed. *See* NRS 598.0973(a).

COUNT XIII – By the State of New York

Violations of New York General Business Law § 399-z

Pursuant to New York Executive Law § 63(12)

91. The plaintiffs must prove that the defendant violated General Business Law § 399-z by establishing:

- A. The defendant is a “telemarketer” or “seller” and

i. “Telemarketer” means any person who, for financial profit or commercial purposes in connection with telemarketing, makes telemarketing sales calls or electronic messaging texts to a customer

1 when the customer is in [New York State] or any person who directly
 2 controls or supervises the conduct of a telemarketer.” GBL § 399-
 3 z(1)(h).

4 ii. “Telemarketing sales call’ means a telephone call or
 5 electronic messaging text made directly or indirectly by a telemarketer
 6 or by any outbound telephone calling technology that delivers a
 7 prerecorded message to a customer or to a customer's voicemail or
 8 answering machine service, in which such telephone call or electronic
 9 messaging text is for the purpose of inducing payment or the exchange
 10 of any other consideration for any goods or services[.]” GBL § 399-
 11 z(1)(j).

12 iii. “Commercial purposes” means “the sale or offer for sale of
 13 goods or services[.]” GBL § 399-z(1)(h).

14 B. The defendant engaged in one of the following:

15 i. The defendant “ma[d]e or cause[d] to be made any unsolicited
 16 telemarketing sales call to any customer when that customer's
 17 telephone number has been on the national ‘do-not-call’ registry,
 18 established by the federal trade commission, for a period of thirty-one
 19 days prior to the date the call is made, pursuant to 16 C.F.R. Section
 20 310.4(b)(1)(iii)(B).” GBL § 399-z(5).

21 ii. The defendant “initiat[ed] any telemarketing sales call by
 22 means of a technology that delivers a pre-recorded message, unless
 23 the telemarketer or seller has obtained from the customer” prior
 24 express written consent. GBL § 399-z(6).

25 92. The plaintiffs must prove that those violations satisfy Executive Law §
 26 63(12):

27 A. The defendant engaged in “repeated … illegal acts … in the carrying
 28 on, conducting or transaction of business.” Exec. L. § 63(12).

- i. “Repeated” means any number of “separate and distinct ... illegal acts which affected more than one individual.” *People v. 21st Century Leisure Spa Int’l Ltd.*, 153 Misc. 2d 938, 944 (Sup. Ct. N.Y. Cnty. 1991).
- ii. “Illegal acts” means acts that violate any law, including New York’s General Business Law. *See, e.g., People v. Applied Card Sys., Inc.*, 27 A.D.3d 104, 104 (3d Dep’t 2005), *aff’d*, 11 N.Y.3d 105 (2008); *People v. Telehublink*, 301 A.D.2d 1006, 1006 (3d Dep’t 2003).

COUNT XIV– By the State of New York

Violations of New York General Business Law § 399-p

93. The plaintiffs must prove each of the following elements pursuant to General Business Law § 399-p:

- A. The defendant is “any natural person, firm, organization, partnership, association or corporation, or other entity, whether for-profit or not-for-profit[.]” GBL § 399-p(1)(b).
- B. The defendant acted “as an ... agent ... of a person operating automatic dialing-announcing devices[.]” GBL § 399-p(2).
- i. “‘Automatic dialing-announcing device’ means any automatic equipment which incorporates a storage capability of telephone numbers to be called and is used, working alone or in conjunction with other equipment, to disseminate a prerecorded message to the telephone number called without the use of an operator[.]” GBL § 399-p(1)(a).
- ii. “A principal-agent relationship may be established by evidence of the consent of one person to allow another to act on his or her behalf and subject to his or her control, and consent by the other so to act[.]”

Time Warner City Cable v. Adelphi Univ., 27 A.D.3d 551, 552 (2d Dep’t 2006) (citations omitted).

C. The “automatic dialing-announcing device ... use[d] a random or sequential number generator to produce a number to be called.” GBL § 399-p(4).

COUNT XV – By the State of North Carolina

Violations of the North Carolina Telephone Solicitations Act

N.C. Gen. Stat. §§ 75-100 to 75-105

94. The Plaintiff State of North Carolina alleged in Count XV that Defendants
8 violated the North Carolina Telephone Solicitations Article of Chapter 75 of the North
9 Carolina General Statutes, N.C.G.S. §§ 75-100 to 75-105, in three ways: by making
10 telephone solicitations to telephone subscribers' numbers on the "Do Not Call" Registry,
11 *see* N.C.G.S. § 75-102(a), (d); by making unsolicited prerecorded telephone calls, *see*
12 N.C.G.S. § 75-104; and by failing to comply with the requirements of several enumerated
sections of the FTC's Telemarketing Sales Rule, *see* 16 C.F.R. §§ 310.3 to 310.5, N.C.G.S.
§ 75102(e).

13 95. With respect to calls made to persons on the “Do Not Call” Registry, North
14 Carolina’s Do-Not-Call Law provides that no telephone solicitor shall make a telephone
15 solicitation to a North Carolina telephone subscriber’s telephone number if the subscriber’s
16 telephone number appears in the latest edition of the National Do Not Call Registry.
17 N.C.G.S. § 75-102(a). The ““Do Not Call’ Registry” is created and maintained by the
18 Federal Trade Commission pursuant to the Telemarketing Sales Rule. N.C.G.S. § 75-
19 101(3). The term “telephone solicitor” means an individual or entity that, directly or
20 through agents, makes or attempts to make telephone solicitations or causes telephone
21 solicitations to be made. N.C.G.S. § 75-101(10). “Telephone solicitor” also includes any
party defined as a “telemarketer” under the FTC’s Telemarketing Sales Rule, 16 C.F.R.
Part 310. N.C.G.S. § 75-101(10). The term “telephone subscriber” means an individual

1 who subscribes to a residential telephone service from a provider, including a wireless
2 telephone company. N.C.G.S. § 75101(11). The term “telephone solicitation” means a
3 voice or text communication, whether prerecorded, live, over a telephone line or wireless
4 telephone network that is made by a telephone solicitor to a telephone subscriber for the
5 purpose of soliciting or encouraging the purchase of goods or services, or obtaining
6 information that will or may be used for that purpose. N.C.G.S. § 75101(9). “Telephone
7 solicitation” also includes those transactions that are defined as “telemarketing” under the
8 FTC’s Telemarketing Sales Rule. 16 C.F.R. Part 310.

9 96. With respect to unsolicited prerecorded calls, the Telephone Solicitations
10 Article of Chapter 75 of the North Carolina General Statutes, N.C.G.S. § 75-104, provides
11 that, subject to some exceptions, no person may use an automatic dialing and recorded
12 message player to make an unsolicited telephone call. N.C.G.S. § 75-104(a). An
13 “unsolicited telephone call” is a voice or text communication, whether prerecorded, live,
14 or a facsimile, over a telephone line or wireless telephone network that is made by a person
15 to a telephone subscriber without prior express invitation or permission. N.C.G.S.
16 § 75101(12). A “person” is defined as any individual, business establishment, business, or
17 other legal entity. N.C.G.S. § 75101(7). “Express invitation or permission” is “[a]ny
18 invitation or permission that is registered by the telephone subscriber on an independent
19 form and that contains the telephone number to which calls can be placed and the signature
20 of the telephone subscriber.” N.C.G.S. § 75-101(6). An “automatic dialing and recorded
21 message player” means, in relevant part, any automatic equipment that incorporates a
storage capability of telephone numbers to be called that, working alone or in conjunction
with other equipment, disseminates a prerecorded message to the telephone number called.
N.C.G.S. § 75101(2).

22 97. Finally, with respect to complying with the requirements of the FTC’s
23 Telemarketing Sales Rule, N.C.G.S. § 75-102(e) provides that no telephone solicitor shall
24 violate any requirement of section 310.3 of the Telemarketing Sales Rule (Deceptive
25 telemarketing acts or practices), section 310.4 of the Telemarketing Sales Rule (Abusive

1 telemarketing acts or practices), or section 310.5 of the Telemarketing Sales Rule (Record
 2 keeping requirements). 16 C.F.R. §§ 310.3 through 310.5.

3 98. Therefore, to prove that Defendants violated the North Carolina Telephone
 4 Solicitations Article of Chapter 75 of the North Carolina General Statutes, N.C.G.S. §§ 75-
 5 100 to 75-105, as alleged in Count XV, the Plaintiff State of North Carolina must prove
 6 the following:

7 A. In violation of N.C.G.S. § 75-102(a),(d), Defendants are “telephone
 8 solicitors,” as defined by N.C.G.S. § 75-101(10), who made “telephone
 9 solicitations,” as defined by N.C.G.S. § 75-101(9), to North Carolina
 10 “telephone subscribers,” as defined by N.C.G.S. § 75-101(11), whose
 11 telephone numbers were in the National “Do Not Call” Registry as defined
 12 by N.C.G.S. § 75-101(3);

13 B. In violation of N.C.G.S. § 75-104, Defendants used an “automatic
 14 dialing and recorded message player,” as defined by N.C.G.S. § 75-101(2),
 15 to make “unsolicited” telephone calls, as defined by N.C.G.S. § 75-101(12);
 16 or

17 C. In violation of N.C.G.S. § 75-102(e), Defendants are “telephone
 18 solicitors,” as defined by N.C.G.S. § 75-101(10), who failed to comply with
 19 requirements of the FTC’s Telemarketing Sales Rule, 16 C.F.R. §§ 310.3
 20 through 310.5.

COUNT XVI – By the State of North Carolina

Violations of North Carolina’s Unfair or Deceptive Trade Practices Act

N.C. Gen. Stat. §§ 75-1.1, et seq.

19 99. The Plaintiff State of North Carolina alleged in Count XVI that Defendants
 20 violated North Carolina’s Unfair or Deceptive Trade Practices Act, N.C.G.S. §§ 75-1.1, *et
 21 seq.* by failing to comply with the requirements of the FTC’s Telemarketing Sales Rule
 (TSR). *See* 16 C.F.R. § 310.3; N.C.G.S. § 75-102(e) (providing that “no telephone solicitor

1 shall violate any requirement of section 310.3 of the Telemarketing Sales Rule (Deceptive
2 telemarketing acts or practices”).

3 100. In order to establish a *prima facie* claim for unfair and deceptive trade
4 practices in North Carolina, the Attorney General must show: (1) Defendants committed
5 an unfair or deceptive act or practice and (2) the action in question was in or affecting
6 commerce. *Dalton v. Camp*, 353 N.C. 647, 656, 548 S.E.2d 704, 711 (2001) (citing *Spartan*
7 *Leasing Inc. v. Pollard*, 101 N.C. App. 450, 461, 400 S.E.2d 476, 482 (1991)). Proof of
8 actual injury is not required when such action is brought by the North Carolina Attorney
9 General. *State ex rel. Edmisten v. Challenge, Inc.*, 54 N.C. App. 513, 522, 284 S.E.2d 333,
10 339 (1981) (“[T]here is no suggestion in our own statutory scheme that the Attorney
11 General would be required to prove such actual injury.” (quoting *Mayton v. Hiatt’s Used*
12 *Cars, Inc.*, 45 N.C. App. 206, 211, 262 S.E.2d 860, 863 (1980))).

13 101. Acts or practices are unfair under N.C.G.S. § 75-1.1 when they offend
14 established public policy, as well as when the practice is immoral, unethical, oppressive,
15 unscrupulous, or substantially injurious to consumers. Under N.C.G.S. § 75-1.1, a practice
16 or act is deceptive if it has the capacity or tendency to deceive; proof of actual deception is
17 not required. See, e.g., *Marshall v. Miller*, 302 N.C. 539, 542, 548, 276 S.E.2d 397, 399,
18 403 (1981) (providing that state courts have generally ruled that the [plaintiff] need only
19 show that an act or practice possessed the tendency or capacity to mislead, or created the
likelihood of deception, in order to prevail under the states’ unfair and deceptive practices
act” (internal citations omitted)). Moreover, “per se violations of § 75–1.1 [may be]
20 established upon proof of a statutory or regulatory violation.” *Sparks v. Oxy-Health, LLC*,
21 134 F. Supp. 3d 961, 997 (E.D.N.C. 2015). Similarly, acts or practices that are unfair or
deceptive trade practices under the TSR are also deceptive or misleading and constitute
unfair or deceptive trade practices prohibited by North Carolina’s Unfair or Deceptive

1 Trade Practices Act.⁵ N.C.G.S. §§ 75-1.1, 102(e); *see also, e.g., Marshall v. Miller*, 302
 2 N.C. 539, 542, 548, 276 S.E.2d 397, 399, 403 (1981) (finding that “federal decisions
 3 interpreting the FTC Act may be used as guidance in determining the scope and meaning
 4 of G.S. 75-1.1” (internal citations omitted)).

5 102. With respect to whether acts or practices are in or affecting commerce within
 6 the State of North Carolina, the UDTPA defines “commerce” to include all business
 7 activities, however denominated, but not professional services rendered by a member of a
 8 learned profession. N.C.G.S. § 75-1.1(b). “‘Business activities’ is a term which connotes
 9 the manner in which businesses conduct their regular, day-to-day activities, or affairs, such
 10 as the purchase and sale of goods, or whatever other activities the business regularly
 11 engages in and for which it is organized.” *HAJMM Co. v. House of Raeford Farms, Inc.*,
 12 328 N.C. 578, 592, 403 S.E.2d 483, 492 (1991). And with respect to business activity in
 13 the form of telephone solicitations, N.C.G.S. 75-101(4) specifies that a person shall be
 14 considered to be “doing business in this State” if they “make or cause to be made any
 15 telephone solicitation to North Carolina telephone subscribers, whether the telephone
 16 solicitations are made from a location inside North Carolina or outside North Carolina.”

17 103. Therefore, to prove that Defendants violated North Carolina’s Unfair or
 18 Deceptive Trade Practices Act, N.C.G.S. §§ 75-1.1, *et seq.*, by failing to comply with the
 19 requirements of the FTC’s Telemarketing Sales Rule (TSR), *see* 16 C.F.R. § 310.3, as
 20 alleged in Count XVI, the Plaintiff State of North Carolina must prove the following:

- 21 A. Defendants committed an unfair or deceptive act or practice; and
 1 B. Defendants’ acts or practices were in or affecting commerce within
 2 the State of North Carolina.
-

18 ⁵ Pursuant to Section 3(c) of the Telemarketing Act, 15 U.S.C. § 6102(c), and Section
 19 18(d)(3) of the FTC Act, 15 U.S.C. § 57a(d)(3), a violation of the TSR constitutes an unfair
 20 or deceptive act or practice in or affecting commerce, in violation of Section 5(a) of the
 21 FTC Act, 15 U.S.C. § 45(a). *See United States v. Dish Network, L.L.C.*, 75 F. Supp. 3d
 942, 1004 (C.D. Ill. 2014) (“A violation of the TSR constitutes an unfair and deceptive act
 or practice in violation of § 5(a) of the [Federal Trade Commission] Act.”).

COUNT XVII – By the State of North Dakota

North Dakota – Violations of the Unlawful Sales or Advertising Practices law

N.D.C.C. ch. 51-15 – Facilitating and Assisting

104. In Count XVII of the Complaint, Plaintiff State of North Dakota alleges Defendants violated N.D.C.C. § 51-15-02.3 by providing assistance or support to any person engaged in any act or practice or practice in violation of N.D.C.C. ch. 51-15 when the Defendants knew or consciously avoided knowing that the other person was engaged in an act or practice in violation of N.D.C.C. ch. 51-15. Pursuant to N.D.C.C. § 51-28-17, a violation of N.D.C.C. ch. 51-28 constitutes a violation of N.D.C.C. ch. 51-15. To prevail on this Count, Plaintiff State of North Dakota will need to show that:

A. A third party violated the North Dakota Telephone Solicitations Act, Ch. 51-28, N.D.C.C., and/or North Dakota's Unlawful Sales or Advertising Practices law, Ch. 51-15, N.D.C.C., by engaging in the one of the following:

i. "ma[d]e or cause[d] to be made any telephone solicitation to the telephone line of any subscriber [in North Dakota] who, for at least thirty-one days before the date the call is made... has been on the national do-not call registry established by the federal trade commission under title 16, Code of Federal Regulations, part 310."

ii. “use[d] or connect[ed] to a telephone line an automatic dialing-announcing device or deliver a prerecorded or synthesized voice message to a subscriber unless the subscriber has knowingly requested, consented to, permitted, or authorized receipt of the message or the message is immediately preceded by a live operator who obtains the subscriber’s consent before the message is delivered...” *See N.D.C.C. § 51-28-02*; or

iii. Deceptive acts and practices in violation of N.D.C.C. § 51-15-02, which requires a showing that:

1 a. Defendants acted, used, or employed any deceptive act
2 or practice, fraud, false pretense, false promises, or
3 misrepresentation;

4 b. With the intent that others rely thereon; and

5 c. In connection with the sale or advertisement of any
6 merchandise.”

7 B. Defendants provided assistance or support to the third party engaged
8 in any act or practice in violation of North Dakota’s Unlawful Sales or
9 Advertising Practices Act., Ch. 51-15, N.D.C.C., including any violations of
10 the North Dakota Telephone Solicitations Act, Ch. 51-28. *See* N.D.C.C. §
11 51-15-02.3; N.D.C.C. § 51-28-17; and

12 C. Defendants knew or consciously avoided knowing that the third party
13 was engaged in acts or practices violating North Dakota’s Unlawful Sales or
14 Advertising Act, Ch. 51-15, N.D.C.C., including any violations of the North
15 Dakota Telephone Solicitations Act, Ch. 51-28. *See* N.D.C.C. § 51-15-02.3;
16 N.D.C.C. § 51-28-17.

17 105. N.D.C.C. § 51-28-01(2) defines “Caller” as “...a person, corporation, firm,
18 partnership, association, or legal or commercial entity that attempts to contact, or that
19 contacts, a subscriber in [North Dakota] by using a telephone or a telephone line.”
20 N.D.C.C. § 51-28-01(2).

21 106. “Telephone solicitation” is defined by N.D.C.C. § 51-28-01(8), which
22 provides:

23 Telephone solicitation means any voice, text, or other electronic
24 communication over a telephone line for the purpose of encouraging
25 charitable contributions, or the purchase or rental of, or investment in,
26 property, goods, services, or merchandise, including as defined in
27 subsection 3 of section 51-15-01, whether the communication is made
28 by a live operator, through the use of an automatic dialing-announcing
29 device or by other means. Telephone solicitation does not include
30 communications:

- A. To any subscriber with that subscriber's express written request, consent, invitation, or permission.
- B. By or on behalf of any person with whom the subscriber has an established personal or business relationship.
- C. By or on behalf of a charitable organization that is exempt from federal income taxation under section 501 of the Internal Revenue Code, but only if the following applies:
 - i. The telephone call is made by a volunteer or employee of the charitable organization; and
 - ii. The person who makes the telephone call immediately discloses the following information upon making contact with the consumer:
 - a. The person's true first and last name; and
 - b. The name, address, and telephone number of the charitable organization.
- D. By or on behalf of any person whose exclusive purpose to poll or solicit the expression of ideas, opinions, or votes, unless the communication is a text message.
- E. By the individual soliciting without the intent to complete, and who does not in fact complete, the sales presentation during the call, but who will complete the sales presentation at a later face-to-face meeting between the individual solicitor or person who makes the initial call the prospective purchaser, unless the communication is a text message.
- F. By or on behalf of a political party, candidate, or other group with a political purpose, as defined in section 16.1-08.1-01, unless the communication is a text message.

N.D.C.C. § 51-28-01(8)(a)-(f).

1 107. “Subscriber” is defined as “...a person who has subscribed to a residential
 2 telephone line or the other persons residing with the subscribing person.” N.D.C.C. § 51-
 28-01(6).

3 108. Automatic dialing-announcing device means a device that selects and dials
 4 telephone numbers and that, working alone or in conjunction with other equipment,
 5 disseminates a prerecorded or synthesized voice message to the telephone number called.”
 N.D.C.C. § 51-28-01(1).

6 109. Definitions and citations to caselaw for a deceptive acts or practices claim
 7 under N.D.C.C. § 51-15-02 are set forth in Count XVIII, *infra*.

8 110. N.D.C.C. § 51-15-02.3 is similar to the Telemarketing Sales Rule’s (“TSR”)
 9 assisting and facilitating provision. *See* 16 C.F.R. § 310.3(b) (“It is a deceptive
 10 telemarketing act or practice and a violation of this Rule for a person to provide substantial
 11 assistance or support to any seller or telemarketer when that person knows or consciously
 avoids knowing that the seller or telemarketer is engaged in any act or practice that violates
 12 ... this Rule.”).

13 111. North Dakota law does not define “assistance or support.” In defining
 14 “substantial assistance” under the TSR, courts have defined it as requiring more than casual
 15 or incidental help to a telemarketer. *See* 16 C.F.R. § 310.3(b); *FTC v. Chapman*, 714 F.3d
 16 1211, 1216 (10th Cir. 2013) (quoting *FTC, Complying with the Telemarketing Sales Rule*,
 17 available at [http://business.ftc.gov/documents/bus27-complying-telemarketing-sales-](http://business.ftc.gov/documents/bus27-complying-telemarketing-sales-rule#assisting)
 rule#assisting (Feb. 2011)); *Consumer Financial Protection Bureau v. Nesheiwat*, No. 21-
 18 56052, 2022 WL 17958636, at *1 (9th Cir. Dec. 27, 2022); *FTC v. Consumer Health*
 19 *Benefits Ass'n*, No. 10-CV-3551 (ILG), 2011 WL 3652248, at *5 (E.D.N.Y. Aug. 18, 2011)
 20 (quoting Telemarketing Sales Rule, 60 Fed. Reg. 43842-01, 43852 (Aug 23, 1995)). There
 21 must be some link between the third party’s actions and the telemarketer, but not
 necessarily a direct connection. *See Chapman*, 714 F.3d at 1216. For example, someone
 who provides lists of contacts to a seller or telemarketer, drafts the language used for
 telemarketing, or makes available incentives to be used in the telemarketing, provides

1 substantial assistance. *See Statement of Basis and Purpose and Final Rule, Telemarketing*
 2 *Sales Rule*, 60 Fed. Reg. 43,842, 43,852 (Aug. 23, 1995).

3 112. North Dakota law does not define “consciously avoids knowing.” However,
 4 in the context of a TSR claim, a person consciously avoids knowing about a violation when
 5 “there are facts and evidence that support an inference of deliberate ignorance.” *Statement*
 6 *of Basis and Purpose and Final Rule, Telemarketing Sales Rule*, 60 Fed. Reg. 43,842,
 7 43,852 n.106 (Aug. 23, 1995) (citing *United States v. Williams*, 32 F.3d 570, at *6 (7th Cir.
 8 1994)); *see FTC v. Chapman*, 714 F.3d 1211, 1219 (10th Cir. 2013) (quoting *FTC,*
 9 *Complying with the Telemarketing Sales Rule*, available at <https://www.ftc.gov/business-guidance/resources/complying-telemarketing-sales-rule> (Feb. 2011)) (“[T]aking deliberate
 10 steps to ensure one's own ignorance of a seller or telemarketer's Rule violations is an
 11 ineffective strategy to avoid liability.”). Knowledge can be inferred from a combination of
 12 suspicion and indifference to the truth. *See United States v. Salinas*, 763 F.3d 869, 875 (7th
 13 Cir. 2014) (discussing the “ostrich instruction”); *Global-Tech Appliances, Inc. v. SEB S.A.*,
 14 563 U.S. 754, 769 (2011) (finding that a willfully blind defendant takes deliberate actions
 15 to avoid confirming a high probability of wrongdoing). Further, “knowledge of the agent
 16 is imputed to the principal.” *United States v. Dish Network L.L.C.*, 954 F.3d 970, 978 (7th
 17 Cir. 2020).

COUNT XVIII – By the State of North Dakota

North Dakota – Violations of the Unlawful Sales or Advertising Practices law

N.D.C.C. ch. 51-15 – Deceptive or Unconscionable practices

113. In Count XVIII of the Complaint, Plaintiff State of North Dakota alleges
 12 Defendants engaged in violations of N.D.C.C. ch. 51-15, the Unlawful Sales or Advertising
 13 Practices Law, specifically N.D.C.C. § 51-15-02. Under N.D.C.C. § 51-15-02, there are
 14 three separate causes of action: the first is based on deceptive acts and practices; the second
 15 is based on unconscionable acts; and the third is based on acts that cause or are likely to
 16

1 cause substantial injury. Thus, to demonstrate a violation of N.D.C.C. § 51-15-02, Plaintiff
2 State of North Dakota must demonstrate one of the following:

3 A. That Defendants engaged in ***deceptive acts and practices*** in violation
4 of N.D.C.C. § 51-15-02, which requires showing that:

- 5 i. Defendants acted, used, or employed any deceptive act or
6 practice, fraud, false pretense, false promise, or misrepresentation;
- 7 ii. with the intent that others rely thereon; and
- 8 iii. in connection with the sale or advertisement of any
9 merchandise; or

10 B. That Defendants engaged in ***unconscionable acts*** in violation of
11 N.D.C.C. § 51-15-02, which requires a showing that:

- 12 i. Defendants used or employed an act or practice in connection
13 with the sale or advertisement of any merchandise; and
- 14 ii. the act or practice was unconscionable; or

15 C. That Defendants' acts caused or were likely to cause ***substantial***
16 ***injury*** in violation of N.D.C.C. § 51-15-02, which requires a showing that:

- 17 i. Defendants used or employed an act or practice in connection
18 with the sale or advertisement of any merchandise which caused or
19 was likely to cause an injury to a consumer;
- 20 ii. the consumer injury was substantial;
- 21 iii. the injury was not outweighed by any countervailing benefits
22 to consumers or to competition; and
- iv. the injury was not an injury the consumers themselves could
reasonably have avoided.

23 N.D.C.C. § 51-15-02.

1 First Cause of Action: Deceptive Acts and Practices

2 114. N.D.C.C. § 51-15-02 provides, in relevant part:

3 The act, use, or employment by any person of any deceptive act or
 4 practice, fraud, false pretense, false promise, or misrepresentation,
 5 with the intent that others rely thereon in connection with the sale or
 6 advertisement of any merchandise, whether or not any person has in
 7 fact been misled, deceived, or damaged thereby, is declared to be an
 8 unlawful practice...

9 N.D.C.C. § 51-15-02.

10 115. “Sale” is defined as “any charitable solicitation or any sale, offer for sale, or
 11 attempt to sell any merchandise for any consideration.” N.D.C.C. § 51-15-01(5).

12 116. “Advertisement” is defined to include “the attempt by publication,
 13 dissemination, solicitation, or circulation, oral or written, to induce, directly or indirectly,
 14 any person to enter into any obligation or acquire any title or interest in any merchandise.”

15 N.D.C.C. § 51-15-01(1).

16 117. “Merchandise” is defined as “any objects, wares, goods, commodities,
 17 intangibles, real estate, charitable contributions, or services.” N.D.C.C. § 51-15-01(3).

18 118. “Person” is defined as “any natural person or the person's legal
 19 representative, partnership, corporation, limited liability company, company, trust,
 20 business entity, or association, and any agent, employee, salesman, partner, officer,
 21 director, member, stockholder, associate, trustee, or cestui que trust thereof.” N.D.C.C. §
 22 51-15-01(4).

23 119. N.D.C.C. § 51-15-02 uses language regarding an intent that others rely, not
 24 an intent to deceive. *See e.g. In re Chrysler-Dodge-Jeep Ecodiesel Mktg., Sales Pracs., &*
Prod. Liab. Litig., 295 F. Supp. 3d 927, 1020 (N.D. Cal. 2018). *See also People ex rel.*
Babbitt v. Green Acres Tr., 127 Ariz. 160, 168, 618 P.2d 1086, 1094 (Ct. App. 1980)⁶

25 ⁶ *Superseded by statute on other grounds*, 1981 Ariz. Sess. Laws, ch. 295, § 5, as
 26 recognized in *State ex rel. Corbin v. Pickrell*, 136 Ariz. 589, 592 (1983).

1 citing A.R.S. § 44-1522(A) (“[R]eliance or actual deception or damage is not a prerequisite
 2 to a consumer fraud action brought by the attorney general” under Arizona’s Consumer
 3 Fraud Act).

4 120. Further, by its plain language, N.D.C.C. § 51-15-02 does not require a
 5 showing that a person was misled, deceived or damaged by the defendant’s unlawful acts.

6 121. The North Dakota Supreme Court has held that for actions brought under Ch.
 7 51-15, N.D.C.C., “the alleged fraudulent conduct must be proved by a preponderance of
 8 the evidence.” *State ex rel. Spaeth v. Eddy Furniture Co.*, 386 N.W.2d 901, 903 (N.D.
 9 1986). In *Eddy Furniture*, the court noted, “it is generally recognized that consumer
 10 protection statutes are remedial in nature, and therefore must be liberally construed in favor
 11 of protecting consumers.” *Id.* (internal citations omitted).

12 Second and Third Causes of Action: Unconscionable Act / Substantial Injury

13 122. N.D.C.C. § 51-15-02 further provides:

14 ...The act, use, or employment by any person of any act or practice,
 15 in connection with the sale or advertisement of any merchandise,
 16 which is unconscionable or which causes or is likely to cause
 17 substantial injury to a person which is not reasonably avoidable by the
 18 injured person and not outweighed by countervailing benefits to
 19 consumers or to competition, is declared to be an unlawful practice.

20 N.D.C.C. § 51-15-02.

21 123. As discussed, *supra*, the following terms are defined by N.D.C.C. § 51-15-
 22 01: “person” (N.D.C.C. § 51-15-01(4)); “sale” (N.D.C.C. § 51-15-01(5)); “advertisement”
 23 (N.D.C.C. § 51-15-01(1)); and “merchandise” (N.D.C.C. § 51-15-01(3)).

1 Unconscionable Acts or Practices:

2 124. The North Dakota Supreme Court has not issued an opinion regarding the
 3 meaning of “unconscionable” in the context of a consumer protection claim under Ch. 51-
 4 15, N.D.C.C.

5 125. In the context of determining a certified question from a federal district court
 6 regarding whether a provision in an arbitration agreement was unconscionable, the North
 7 Dakota Supreme Court stated, “that a party alleging unconscionability must demonstrate
 8 some quantum of both procedural and substantive unconscionability, and courts are to
 9 balance the various factors, viewed in totality, to determine whether the particular
 10 contractual provision is ‘so one-sided as to be unconscionable.’” *Strand v. U.S. Bank Nat.*
 11 *Ass'n ND*, 2005 ND 68, ¶ 12, 693 N.W.2d 918, 924 citing *Construction Assocs., Inc. v.*
 12 *Fargo Water Equip. Co.*, 446 N.W.2d 237, 241 (1989).

13 126. With regards to procedural unconscionability, the North Dakota Supreme
 14 Court explained:

15 Procedural unconscionability focuses upon formation of the contract
 16 and fairness of the bargaining process, including factors such as
 17 inequality of bargaining power, oppression, and unfair surprise... Courts are more likely to find unconscionability in consumer
 18 transactions than in contracts arising in purely commercial settings
 19 involving experienced parties.

20 15 *Strand v. U.S. Bank Nat. Ass'n ND*, 2005 ND 68, ¶ 13, citing *Construction Assocs.*, 446
 21 N.W.2d at 241-42.

22 17 127. With regards to substantive unconscionability, the North Dakota Supreme
 23 Court explained, “[s]ubstantive unconscionability focuses upon the harshness or one-
 24 sidedness of the contractual provision in question. *Strand*, 2005 ND 68, ¶ 20, citing
 25 *Construction Assocs.*, 446 N.W.2d at 241.

1 Substantial Injury:

2 128. There is no relevant North Dakota caselaw regarding the “substantial injury”
3 test under N.D.C.C. § 51-15-02. However, the “substantial injury test” under N.D.C.C. §
4 51-15-02 is similar to the “unfairness test” under Section 5 of the Federal Trade
5 Commission Act, which provides: a practice is “unfair” if it “causes or is likely to cause
6 substantial injury to consumers which is not reasonably avoidable by consumers
themselves and not outweighed by countervailing benefits to consumers or benefits.” 15
U.S.C. § 45(n).

7 129. The Ninth Circuit has held that, under the FTC Act, an act or practice can
8 cause “substantial injury” by doing a “small harm to a large number of people, or if it raises
9 a significant risk of concrete harm.” *F.T.C. v. Neovi, Inc.*, 604 F.3d 1150, 1157–58 (9th
Cir. 2010).

10 130. Further, under Ninth Circuit precedent, an injury is reasonably avoidable -
11 under the FTC Act - if consumers “have reason to anticipate the impending harm and the
means to avoid it,” or if consumers are aware of, and are reasonably capable of pursuing,
12 potential avenues toward mitigating the injury after the fact. *Davis v. HSBC Bank Nevada,*
13 *N.A.*, 691 F.3d 1152, 1168–69 (9th Cir. 2012) *citing Orkin Exterminating Co., Inc. v.*
14 *FTC*, 849 F.2d 1354, 1365–66 (11th Cir.1988).

15 131. With regards to whether consumer harm is “not outweighed by
16 countervailing benefits to consumers or to competition,” the District Court of Arizona has
17 held that the relevant act or practice which the countervailing benefits should be measured
are those outlined in the plaintiff’s pleadings, not the defendant’s business practices as a
whole. *Fed. Trade Comm'n v. Elec. Payment Sols. of Am. Inc.*, No. CV-17-02535-PHX-
18 SMM, 2021 WL 3661138, at *12 (D. Ariz. Aug. 11, 2021).

COUNT XIX – By the State of Rhode Island

Rhode Island – Violations of the Telephone Sales Solicitation Act

R I Gen. Laws § 5-61-1, *et seq.*

Defendants routed telephone solicitations from unregistered telephonic sellers to Rhode Islanders in violation of the TSSA.

132. A telephone sales solicitation operation or telephonic seller is effectively registered to do business in Rhode Island only when:

- A. A filing containing all the information required by R.I. Gen. Laws § 5-61-4 has been submitted to the Consumer and Economic Justice Unit of the Rhode Island Department of Attorney General; R.I. Gen. Laws § 5-61-3(a);
 - B. The filing is accompanied by a one hundred dollar (\$100) filing fee; R.I. Gen. Laws § 5-61-3(a);
 - C. The seller has delivered and filed a surety bond, irrevocable letter of credit, or certificate of deposit in a federally insured financial institution for a minimum amount of thirty thousand dollars (\$30,000), or if the Rhode Island Department of Attorney General, in its discretion, established a greater value, for that discretionary amount; R.I. Gen. Laws § 5-61-3.1(a)-(b);
 - D. The Rhode Island Department of Attorney General has sent a written confirmation of receipt of the filing to the seller's principal business location; R.I. Gen. Laws § 5-61-3(d);
 - E. The seller has made copies for each of its business locations if it has more than one business location; R.I. Gen. Laws § 5-61-3(d);
 - F. The seller has posted the confirmation of receipt of filing within ten (10) days of receipt in a conspicuous place at each of the seller's business locations; R.I. Gen. Laws § 5-61-3(d);
 - G. The business done in Rhode Island commences within one year from the date the seller received and posted the written confirmation or has

1 renewed its annual registration, and received written confirmation of
 2 renewal; R.I. Gen. Laws §§ 5-61-3(b)–(c); and

3 H. The Consumer and Economic Justice Unit of the Rhode Island
 4 Department of Attorney General has not otherwise delayed, rejected, or
 revoked the registration.

5 R.I. Gen. Laws § 5-61-3(e); *see also* R.I. Gen. Laws § 5-61-3.2.

6 133. A telephone sales solicitation operation or telephonic seller is deemed to do
 business in Rhode Island when:

- 7 A. The seller solicits person(s) to become obligated to the seller from
 locations in Rhode Island; or
- 8 B. The seller solicits person(s) who are located in Rhode Island to
 become obligated to the seller.

9 R.I. Gen. Laws § 5-61-3(a); *see also* R.I. Gen. Laws § 5-61-2(7).

10 11 Defendants routed telephone solicitations with pre-recorded messages to Rhode Islanders
 12 in violation of the TSSA.

13 134. A telephonic seller may make calls using prerecorded or synthesized voice
 messages into or within Rhode Island only if:

- 14 A. The subscriber has knowingly or voluntarily requested, consented to,
 permitted, or authorized receipt of the message; R.I. Gen. Laws § 5-61-
 3.4(a);
- 15 B. The message is immediately preceded by a live operator who has:
 - 16 i. Obtained the subscriber's consent before the message is
 delivered; R.I. Gen. Laws § 5-61-3.4(a);
 - 17 ii. Made the proper disclosures required by R.I. Gen. Laws § 5-
 61-3.4(c)(1)–(4) at the outset of the message.
- 18 C. The recorded message is from a school district to students, parents, or
 employees; R.I. Gen. Laws § 5-61-3.4(b); or

- 1 D. The recorded message is from an employer advising employees of
2 work schedules; R.I. Gen. Laws § 5-61-3.4(b); and
3 E. The automatic-dialing-announcing device used to make calls into or
4 within Rhode Island is designed and operated so as to create a disconnect
5 signal or an on-hook condition that allows the subscriber's line to be released
6 within five (5) seconds after termination of the telephone call by the
7 subscriber. R.I. Gen. Laws § 5-61-3.4(d).

8
9
10 Defendants provided telephonic seller customers with Rhode Islanders' telephone numbers
11 who were then targeted for pre-recorded calls in violation of the TSSA.

12 135. A person who causes a telephone solicitation or attempted telephone
13 solicitation to occur is a telephonic seller for the purposes of the TSSA when:

- 14 A. The occurrence of the telephone solicitation or attempted telephone
15 solicitation is caused by a person on their own behalf;
16 B. The occurrence of the telephone solicitation or attempted telephone
17 solicitation is caused by a person acting through salespersons; or
18 C. The telephone solicitation or attempted telephone solicitation occurs
19 through the use of an automatic-dialing-announcing device; and
20 D. The person is not otherwise exempted from the meaning of
21 "telephonic seller" or "seller."

22 R.I. Gen. Laws § 5-61-2(9)–(10).

23
24 Defendants routed telephone solicitations from telephonic seller customers to Rhode
25 Islanders whose numbers they knew were targeted on the National DNC Registry in
26 violation of the TSSA.

27 136. A salesperson or telephonic seller may make, or cause to be made,
28 unsolicited telephone sales calls to a residential, mobile, or telephonic-paging-device only
29 if:

- 1 A. the salesperson or telephonic seller has instituted procedures for
 2 maintaining a list of persons who do not wish to receive telephonic sales calls
 3 made by or on behalf of that person; and
 4 B. the instituted procedures are in compliance with 47 C.F.R. Part 64 or
 5 16 C.F.R. § 310.

6 R.I. Gen. Laws § 5-61-3.5(a); *see also* 16 C.F.R. § 310.4(b)(iii)(B) (2024) (It is an abusive
 7 practice to initiate an outbound telephone call to a person when the person's phone number
 8 is on the National DNC Registry without that person's written consent). *See generally* 47
 9 C.F.R. § 64 (2023); 16 C.F.R. § 310 (2024).

10 8 **COUNT XX – By the State of Rhode Island**

11 9 **Rhode Island – Violations of the Deceptive Trade Practices Act**

12 10 **R. I. Gen. Laws § 6-13.1-1, et seq.**

13 11 Defendants' acts, practices, representations, and omissions violate the RI DTPA's
 14 prohibition against unfair trade practices.

15 12 137. Conduct is unfair for the purposes of the RI DTPA when a plaintiff shows
 16 that:

- 17 14 A. “the practice, without necessarily having been previously considered
 18 unlawful, offends public policy as it has been established by statutes, the
 19 common law, or otherwise—whether, in other words, it is within at least the
 20 penumbra of some common-law, statutory, or other established concept of
 21 unfairness;”
 22 B. “it is immoral, unethical, oppressive, or unscrupulous;” or
 23 C. “it causes substantial injury to consumers (or competitors or other
 24 businessmen).”

25 20 *Long v. Dell*, 93 A.3d 988, 100 (R.I. 2014) (quoting *Ames v. Oceanside Welding and*
 26 *Towing Co.*, 767 A.2d 677, 681 (R.I. 2001)).

1 138. All three of the factors do not need to be established. Rather, unfairness may
 2 be proven by “showing that a trade practice meets one factor to a great degree or two or
 3 three factors to a lesser degree.” *Id.* at 1001.

4 139. Conduct is deceptive for the purposes of the RI DTPA when a plaintiff shows
 5 that:

- 6 A. “‘a representation, omission, or practice, that’”
- 7 B. “is likely to mislead consumers acting reasonably under the
 circumstances, and”
- 8 C. the representation, omission, or practice is material.””

9 *Long v. Dell*, 93 A.3d 988, 1003 (R.I. 2014) (quoting *F.T.C. v. Verity Int'l Ltd.*, 443 F.3d
 10 48, 63 (2d Cir. 2006).

11 140. A representation is material if it “involves information that is important to
 12 consumers and, hence, likely to affect their choice of, or conduct regarding, a product,”
 13 and “express representations that are shown to be false are presumptively material.” *Long*,
 14 93 A.3d at 1003 (quoting *F.T.C. v. Patriot Alcohol Testers, Inc.*, 798 F. Supp. 851, 855 (D.
 15 Mass. 1992); *Cliffdale Assoc., Inc.*, 103 F.T.C. 110, 165 (1984).

16 141. Conduct occurs in trade or commerce when it involves the:
 17 A. Advertising, offering for sale, sale, or distribution of
 18 B. Any services or any tangible or intangible, real, personal, or mixed
 property, and any other article, commodity, or thing of value wherever
 situate,
 19 C. Including any trade or commerce directly or indirectly affecting the
 people of Rhode Island.

20 R.I. Gen. Laws § 6-13.1-1(5).

21

COUNT XXI – By the State of Washington

Violation of the Washington State Consumer Protection Act, RCW 19.86.020

142. The CPA prohibits “unfair or deceptive acts or practices in the conduct of any trade or commerce.” RCW 19.86.020. Through this “broad prohibit[ion] . . . the legislature intended to provide sufficient flexibility to reach unfair or deceptive conduct that inventively evades regulation.” *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 37, 204 P.3d 885 (2009). The CPA “is to be liberally construed.” RCW 19.86.920. This liberal construction directive ensures the protection of the public and the existence of fair and honest competition. *Id.*; see also *State v. Ralph Williams’ North West Chrysler Plymouth, Inc.*, 82 Wn.2d 265, 274, 510 P.2d 233 (1973).

143. To prevail on a CPA claim, the State must prove (1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, and (3) a public interest impact. *State v. Mandatory Poster Agency*, 199 Wn. App. 506, 518, 398 P.3d 1271 (2017); see also RCW 19.86.020; .920. Unlike private plaintiffs, the State “is not required to prove causation or injury.” *Mandatory Poster*, 199 Wn. App. at 518.

UNFAIR OR DECEPTIVE ACT

144. Deception exists if there is a representation, omission or practice that has “the capacity to deceive” a reasonable consumer. *Panag*, 166 Wn.2d at 47 (emphasis added). The State need not show actual deception, nor that Allure *intended* to deceive. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 785, 719 P.2d 531 (1986); *LA Investors*, 2 Wn. App. 2d at 537-39. “A deceptive act or practice is measured by ‘the net impression’ on a reasonable consumer.” *Mandatory Poster*, 199 Wn. App. at 519; *Panag*, 166 Wn.2d at 50. In evaluating whether a representation has the tendency or capacity to deceive, courts are directed to look not to the most sophisticated consumers, but the very least. *Panag*, 166 Wn.2d at 50.

¹⁴⁵ Unfair acts or practices violate the CPA, even if they are not deceptive. See *Klem v. Wash. Mut. Bank*, 176 Wn.2d 771, 787, 295 P.3d 1179 (2013). An act is “unfair”

1 if it offends public policy, as established by statutes, the common law, or otherwise; is
2 immoral, unethical, oppressive, or unscrupulous; or causes substantial injury to consumers.
3 *Rush v. Blackburn*, 190 Wn. App. 945, 962-63, 361 P.3d 217 (2015). Allure's NDAs
violate the CPA.

4 146. Pursuant to Section 3(c) of the Telemarketing Act, 15 U.S.C. § 6102(c), and
5 Section 18(d)(3) of the FTC Act, 15 U.S.C. § 57a(d)(3), a violation of the TSR constitutes
6 an unfair or deceptive act or practice in or affecting commerce, in violation of Section 5(a)
of the FTC Act, 15 U.S.C. § 45(a).

OCCURRING IN TRADE OR COMMERCE

9 147. The CPA broadly defines “trade” and “commerce” to include “the sale of
assets or services, and any commerce directly or indirectly affecting the people of the state
of Washington.” RCW 19.86.010(2). The CPA “bring[s] within its reach *every* person who
conducts unfair or deceptive acts or practices in *any* trade or commerce.” *Michael v.*
10 *Mosquera-Lacy*, 165 Wn.2d 595, 602, 200 P.3d 695 (2009). The terms “trade” and
11 “commerce” are interpreted broadly to include “the sale of assets or services, and any
commerce directly or indirectly affecting the people of the state of Washington.” RCW
12 19.86.010(2); *Hangman Ridge*, 105 Wn.2d at 785.
13

15 | AFFECTING THE PUBLIC INTEREST

16 148. In determining whether unfair or deceptive conduct affects the public
interest, Washington courts consider five factors: (1) were the alleged acts committed in
17 the course of the defendants' business; (2) was there a pattern or generalized course of
conduct; (3) were the acts repeated; (4) is there a real and substantial potential for
18 repetition; and (5) if the act complained of involved a single transaction, were many
19 consumers affected or likely to be affected by it. *Hangman Ridge*, 105 Wn.2d at 790. No
20 one factor is dispositive, and they do not need to all be present to establish a public interest
21 impact. *Id.* at 791.

1 REMEDIES

2 149. The CPA provides for a range of remedies, including restitution, civil
3 penalties per violation, injunctive relief, and attorneys' fees and costs. RCW 19.86.080;
4 RCW 19.86.140.

5 **COUNT XXII – By the State of Wisconsin**

6 **Knowingly Assisting Violations of Telephone Solicitations Rules**

7 **Wis. Admin. Code § ATCP 127.20**

8 150. Plaintiff, State of Wisconsin, brings Count XXII for violations of Wis.
9 Admin. Code ATCP ch. 127 (Direct Marketing), which was promulgated by the Wisconsin
10 Department of Agriculture, Trade and Consumer Protection under the authority of Wis.
11 Stat. § 100.20(2).

12 151. In Count XXII, Plaintiff State of Wisconsin will need to show that
13 Defendants knowingly assisted sellers to engage in any activity or practice in violation of
14 Wis. Admin. Code ATCP ch. 127 Subchapter II, Telephone Solicitations. Count XXII
15 encompasses three subclaims.

16 152. Count XXII is brought pursuant to Wis. Stat. §§ 100.20(6) and 100.26(6),
17 which authorize the State to recover pecuniary losses suffered by Wisconsin consumers
18 and to enforce and restrain violations of Wis. Stat. § 100.20 and Wis. Admin. Code ATCP
19 ch. 127. Each separate violation of Wis. Admin. Code ATCP § 127.20 is subject to a civil
20 forfeiture of not less than \$100 nor more than \$10,000 per Wis. Stat. § 100.26(6).

1 153. “No person may knowingly assist⁷ any seller⁸ to engage in any activity or
 2 practice in violation of this subchapter.” (Wis. Admin. Code ATCP § 127.20).

3

4 ⁷ Wisconsin law does not define “knowingly assist” or “knowingly facilitate” for
 5 purposes of the rules cited herein. However, Wis. Admin. Code ATCP §§ 127.20 and
 6 127.83(2)(d) are similar to the Telemarketing Sales Rule’s (TSR) assisting and facilitating
 7 provision. *See* 16 C.F.R. § 310.3(b) (“It is a deceptive telemarketing act or practice and a
 8 violation of this [Rule] for a person to provide substantial assistance or support to any seller
 9 or telemarketer when that person knows or consciously avoids knowing that the seller or
 10 telemarketer is engaged in any act or practice that violates . . . this [Rule].”)/ Wisconsin
 11 law does not require that the assistance be “substantial.” But even substantial assistance,
 12 “does not impose a demanding standard[.]” *FTC v. Day Pacer LLC*, 689 F. Supp. 3d 609,
 13 642, (N.D. Ill. 2023). In defining “substantial assistance,” courts have defined it as
 14 requiring more than casual or incidental help to a telemarketer. *See* 16 C.F.R. § 310.3(b);
 15 *FTC v. Chapman*, 714 F.3d 1211, 1216 (10th Cir. 2013) (quoting *FTC, Complying with the*
Telemarketing Sales Rule, available at [http://business.ftc.gov/documents/bus27-](http://business.ftc.gov/documents/bus27-complying-telemarketing-sales-rule#assisting)
complying-telemarketing-sales-rule#assisting (Feb. 2011)); *Consumer Financial*
Protection Bureau v. Nesheiwat, No. 21-56052, 2022 WL 17958636, at *1 (9th Cir. Dec.
 16 27, 2022); *FTC v. Consumer Health Benefits Ass’n*, No. 10-CV-3551 (ILG), 2011 WL
 17 3652248, at *5 (E.D.N.Y. Aug. 18, 2011) (quoting Telemarketing Sales Rule, 60 Fed. Reg.
 18 43842-01, 43852 (Aug 23, 1995)). “To constitute substantial assistance, there must be a
 19 connection between the assistance provided and the resulting violations of the core
 20 provisions of the TSR. *U.S. v. Dish Network, L.L.C.*, 667 F. Supp. 2d 952, 961, (C.D. Ill.
 21 2009). Knowledge can be inferred from a combination of suspicion and indifference to the
 truth. *See United States v. Salinas*, 763 F.3d 869, 875 (7th Cir. 2014) (discussing the
 “ostrich instruction”). Knowledge may be inferred when the person providing assistance
 receives complaints about violations. *FTC v. Day Pacer LLC*, 689 F. Supp. 3d at 642.

8 “Seller” means a person, other than a bank, savings bank, savings and loan association,
 credit union, insurance company, public utility, or telecommunications carrier engaged in
 exempt activities under s. 93.01 (1m), Stats., who is engaged in the business of selling,
 offering to sell, or promoting the sale of consumer goods or services to consumers. “Seller”
 includes all of the following:

1. A person who accepts payment for a purported sale of consumer goods or services to a consumer.
2. An employee or agent of a seller.
3. A person who makes solicitations under arrangement with a seller. (Wis. Admin. Code ATCP § 127.01(21)).

1 154. Disclosures Subclaim: Knowingly assisting sellers to engage in telephone
 2 solicitations⁹ that failed to make required disclosures (*See* Wis. Admin. Code ATCP §§
 3 127.04, 127.20).

4 A. Element 1: Defendants knowingly assisted sellers to engage in telephone
 5 solicitations that failed to make required disclosures (*See* Wis.
 6 Admin. Code ATCP §§ 127.04, 127.20); and

7 B. Element 2: The sellers made telephone solicitations that failed to disclose in a telephone solicitation (*See* Wis. Admin. Code ATCP §
 8 127.04(1));

9 i. The name of the principal seller (*See* Wis. Admin. Code ATCP
 10 § 127.04(1)(a)); and

11 ii. The nature of the goods or services which the seller was
 12 offering or promoting (*See* Wis. Admin. Code ATCP § 127.04(1)(d)).

13 155. Misrepresentations Subclaim: Knowingly assisting sellers to engage in telephone transactions¹⁰ that included misrepresentations (*See* Wis. Admin. Code ATCP
 14 §§ 127.14, 127.20).

15 ⁹ "Telephone solicitation" means a solicitation, under s. ATCP 127.01(22), that a seller makes to a consumer by telephone, videoconferencing, or other interactive electronic voice communications. (Wis. Admin. Code ATCP § 127.02(3)). "Solicitation" means a communication received by a consumer at a place other than the seller's regular place of business, in which a seller offers or promotes the sale of consumer goods or services to a consumer, or which is part of a seller's plan or scheme to sell consumer goods or services to a consumer. (*See* Wis. Admin. Code ATCP § 127.01(22)).

16 ¹⁰ "Telephone transaction" means any of the following:

- 19 1. A telephone solicitation.
- 20 2. Purchase contracts and other dealings that result from a telephone solicitation. (Wis.
 21 Admin. Code ATCP § 127.02(4)).

- 1 A. Element 1: Defendants knowingly assisted sellers to engage in
2 telephone solicitations that included misrepresentations (See Wis. Admin.
3 Code ATCP §§ 127.14, 127.20); and
4 B. Element 2: The sellers, in a telephone transaction, directly or
impliedly (See Wis. Admin. Code ATCP § 127.14):
5 i. Misrepresented the seller's identity, affiliation, location, or
characteristics (See Wis. Admin. Code ATCP § 127.14(1));
6 ii. Misrepresented the nature, quantity, material characteristics,
performance, or efficacy of the goods or services offered or promoted
by the seller (See Wis. Admin. Code ATCP § 127.14(5));
7 iii. Misrepresented that the seller is affiliated with, or endorsed by,
any government or 3rd party organization (See Wis. Admin. Code
8 ATCP § 127.14(9)); and/or
9 iv. Made false, deceptive, or misleading representations to a
consumer (See Wis. Admin. Code ATCP § 127.14(15)).

10 156. Restricted Times Subclaim: Knowingly assisting sellers to engage in
11 telephone solicitations during restricted times (*See* Wis. Admin. Code ATCP §§ 127.16(3),
12 127.20).

- 13 A. Element 1: Defendants knowingly assisted sellers to initiate telephone
14 solicitations to consumers before 8:00 AM or after 9:00 PM (See Wis.
15 Admin. Code ATCP §§ 127.16(3), 127.20); and
16 B. Element 2: The telephone solicitations were made without prior
17 consent of the consumers (See Wis. Admin. Code ATCP § 127.16(3)).

18

19

20

21

1 **COUNT XXIII – By the State of Wisconsin**

2 **Knowingly Facilitating Violations of Telephone Solicitations**

3 **Do-Not-Call Rules. Wis. Admin. Code § ATCP 127.83(2)(d)**

4 157. Plaintiff, State of Wisconsin, brings Count XXIII for violations of Wis.
 5 Admin. Code ATCP ch. 127 (Direct Marketing), which was promulgated by the Wisconsin
 6 Department of Agriculture, Trade and Consumer Protection under the authority of Wis.
 7 Stat. § 100.20(2).

8 158. In Count XXIII, Plaintiff State of Wisconsin will need to show that
 9 Defendants knowingly facilitated any person's violation of Wis. Admin. Code ATCP ch.
 10 127 Subchapter V, Telephone Solicitations; State Do-Not-Call Registry. Count XXIII
 11 consists of two subclaims.

12 159. Count XXIII is brought pursuant to Wis. Stat. §§ 100.20(6) and 100.26(6),
 13 which authorize the State to recover pecuniary losses suffered by Wisconsin consumers
 14 and to enforce and restrain violations of Wis. Stat. § 100.20 and Wis. Admin. Code ATCP
 15 ch. 127. Each separate violation of Wis. Admin. Code ATCP § 127.83(3)(d) is subject to
 16 a civil forfeiture of not less than \$100 nor more than \$10,000 per Wis. Stat. § 100.26(6).

17 160. No person may “Require, instruct, or authorize any person to violate this
 18 subchapter, or knowingly facilitate¹¹ any person's violation of this subchapter.” (Wis.
 19 Admin. Code ATCP § 127.83(2)(d)).

20 161. Do-Not-Call Subclaim: Knowingly facilitate any person in making a
 21 telephone solicitation to a customer whose telephone number appears on the do-not-call
 22 registry (*See* Wis. Admin. Code ATCP §§ 127.82(2), 127.83(2)(d)).

23 A. Element 1: Defendants knowingly facilitated persons to make
 24 telephone solicitations, either directly or through an employee or agent, to
 25 customers on the state do-not-call registry (*See* Wis. Admin. Code ATCP §§
 26 127.82(2), 127.83(2)(d)); and

27
 28
 29
 30
 31
 32
 33
 34
 35
 36
 37
 38
 39
 40
 41
 42
 43
 44
 45
 46
 47
 48
 49
 50
 51
 52
 53
 54
 55
 56
 57
 58
 59
 60
 61
 62
 63
 64
 65
 66
 67
 68
 69
 70
 71
 72
 73
 74
 75
 76
 77
 78
 79
 80
 81
 82
 83
 84
 85
 86
 87
 88
 89
 90
 91
 92
 93
 94
 95
 96
 97
 98
 99
 100
 101
 102
 103
 104
 105
 106
 107
 108
 109
 110
 111
 112
 113
 114
 115
 116
 117
 118
 119
 120
 121
 122
 123
 124
 125
 126
 127
 128
 129
 130
 131
 132
 133
 134
 135
 136
 137
 138
 139
 140
 141
 142
 143
 144
 145
 146
 147
 148
 149
 150
 151
 152
 153
 154
 155
 156
 157
 158
 159
 160
 161
 162
 163
 164
 165
 166
 167
 168
 169
 170
 171
 172
 173
 174
 175
 176
 177
 178
 179
 180
 181
 182
 183
 184
 185
 186
 187
 188
 189
 190
 191
 192
 193
 194
 195
 196
 197
 198
 199
 200
 201
 202
 203
 204
 205
 206
 207
 208
 209
 210
 211
 212
 213
 214
 215
 216
 217
 218
 219
 220
 221
 222
 223
 224
 225
 226
 227
 228
 229
 230
 231
 232
 233
 234
 235
 236
 237
 238
 239
 240
 241
 242
 243
 244
 245
 246
 247
 248
 249
 250
 251
 252
 253
 254
 255
 256
 257
 258
 259
 260
 261
 262
 263
 264
 265
 266
 267
 268
 269
 270
 271
 272
 273
 274
 275
 276
 277
 278
 279
 280
 281
 282
 283
 284
 285
 286
 287
 288
 289
 290
 291
 292
 293
 294
 295
 296
 297
 298
 299
 300
 301
 302
 303
 304
 305
 306
 307
 308
 309
 310
 311
 312
 313
 314
 315
 316
 317
 318
 319
 320
 321
 322
 323
 324
 325
 326
 327
 328
 329
 330
 331
 332
 333
 334
 335
 336
 337
 338
 339
 340
 341
 342
 343
 344
 345
 346
 347
 348
 349
 350
 351
 352
 353
 354
 355
 356
 357
 358
 359
 360
 361
 362
 363
 364
 365
 366
 367
 368
 369
 370
 371
 372
 373
 374
 375
 376
 377
 378
 379
 380
 381
 382
 383
 384
 385
 386
 387
 388
 389
 390
 391
 392
 393
 394
 395
 396
 397
 398
 399
 400
 401
 402
 403
 404
 405
 406
 407
 408
 409
 410
 411
 412
 413
 414
 415
 416
 417
 418
 419
 420
 421
 422
 423
 424
 425
 426
 427
 428
 429
 430
 431
 432
 433
 434
 435
 436
 437
 438
 439
 440
 441
 442
 443
 444
 445
 446
 447
 448
 449
 450
 451
 452
 453
 454
 455
 456
 457
 458
 459
 460
 461
 462
 463
 464
 465
 466
 467
 468
 469
 470
 471
 472
 473
 474
 475
 476
 477
 478
 479
 480
 481
 482
 483
 484
 485
 486
 487
 488
 489
 490
 491
 492
 493
 494
 495
 496
 497
 498
 499
 500
 501
 502
 503
 504
 505
 506
 507
 508
 509
 510
 511
 512
 513
 514
 515
 516
 517
 518
 519
 520
 521
 522
 523
 524
 525
 526
 527
 528
 529
 530
 531
 532
 533
 534
 535
 536
 537
 538
 539
 540
 541
 542
 543
 544
 545
 546
 547
 548
 549
 550
 551
 552
 553
 554
 555
 556
 557
 558
 559
 560
 561
 562
 563
 564
 565
 566
 567
 568
 569
 570
 571
 572
 573
 574
 575
 576
 577
 578
 579
 580
 581
 582
 583
 584
 585
 586
 587
 588
 589
 590
 591
 592
 593
 594
 595
 596
 597
 598
 599
 600
 601
 602
 603
 604
 605
 606
 607
 608
 609
 610
 611
 612
 613
 614
 615
 616
 617
 618
 619
 620
 621
 622
 623
 624
 625
 626
 627
 628
 629
 630
 631
 632
 633
 634
 635
 636
 637
 638
 639
 640
 641
 642
 643
 644
 645
 646
 647
 648
 649
 650
 651
 652
 653
 654
 655
 656
 657
 658
 659
 660
 661
 662
 663
 664
 665
 666
 667
 668
 669
 670
 671
 672
 673
 674
 675
 676
 677
 678
 679
 680
 681
 682
 683
 684
 685
 686
 687
 688
 689
 690
 691
 692
 693
 694
 695
 696
 697
 698
 699
 700
 701
 702
 703
 704
 705
 706
 707
 708
 709
 710
 711
 712
 713
 714
 715
 716
 717
 718
 719
 720
 721
 722
 723
 724
 725
 726
 727
 728
 729
 730
 731
 732
 733
 734
 735
 736
 737
 738
 739
 740
 741
 742
 743
 744
 745
 746
 747
 748
 749
 750
 751
 752
 753
 754
 755
 756
 757
 758
 759
 760
 761
 762
 763
 764
 765
 766
 767
 768
 769
 770
 771
 772
 773
 774
 775
 776
 777
 778
 779
 780
 781
 782
 783
 784
 785
 786
 787
 788
 789
 790
 791
 792
 793
 794
 795
 796
 797
 798
 799
 800
 801
 802
 803
 804
 805
 806
 807
 808
 809
 810
 811
 812
 813
 814
 815
 816
 817
 818
 819
 820
 821
 822
 823
 824
 825
 826
 827
 828
 829
 830
 831
 832
 833
 834
 835
 836
 837
 838
 839
 840
 841
 842
 843
 844
 845
 846
 847
 848
 849
 850
 851
 852
 853
 854
 855
 856
 857
 858
 859
 860
 861
 862
 863
 864
 865
 866
 867
 868
 869
 870
 871
 872
 873
 874
 875
 876
 877
 878
 879
 880
 881
 882
 883
 884
 885
 886
 887
 888
 889
 890
 891
 892
 893
 894
 895
 896
 897
 898
 899
 900
 901
 902
 903
 904
 905
 906
 907
 908
 909
 910
 911
 912
 913
 914
 915
 916
 917
 918
 919
 920
 921
 922
 923
 924
 925
 926
 927
 928
 929
 930
 931
 932
 933
 934
 935
 936
 937
 938
 939
 940
 941
 942
 943
 944
 945
 946
 947
 948
 949
 950
 951
 952
 953
 954
 955
 956
 957
 958
 959
 960
 961
 962
 963
 964
 965
 966
 967
 968
 969
 970
 971
 972
 973
 974
 975
 976
 977
 978
 979
 980
 981
 982
 983
 984
 985
 986
 987
 988
 989
 990
 991
 992
 993
 994
 995
 996
 997
 998
 999
 1000
 1001
 1002
 1003
 1004
 1005
 1006
 1007
 1008
 1009
 10010
 10011
 10012
 10013
 10014
 10015
 10016
 10017
 10018
 10019
 10020
 10021
 10022
 10023
 10024
 10025
 10026
 10027
 10028
 10029
 10030
 10031
 10032
 10033
 10034
 10035
 10036
 10037
 10038
 10039
 10040
 10041
 10042
 10043
 10044
 10045
 10046
 10047
 10048
 10049
 10050
 10051
 10052
 10053
 10054
 10055
 10056
 10057
 10058
 10059
 10060
 10061
 10062
 10063
 10064
 10065
 10066
 10067
 10068
 10069
 10070
 10071
 10072
 10073
 10074
 10075
 10076
 10077
 10078
 10079
 10080
 10081
 10082
 10083
 10084
 10085
 10086
 10087
 10088
 10089
 10090
 10091
 10092
 10093
 10094
 10095
 10096
 10097
 10098
 10099
 100100
 100101
 100102
 100103
 100104
 100105
 100106
 100107
 100108
 100109
 100110
 100111
 100112
 100113
 100114
 100115
 100116
 100117
 100118
 100119
 100120
 100121
 100122
 100123
 100124
 100125
 100126
 100127
 100128
 100129
 100130
 100131
 100132
 100133
 100134
 100135
 100136
 100137
 100138
 100139
 100140
 100141
 100142
 100143
 100144
 100145
 100146
 100147
 100148
 100149
 100150
 100151
 100152
 100153
 100154
 100155
 100156
 100157
 100158
 100159
 100160
 100161
 100162
 100163
 100164
 100165
 100166
 100167
 100168
 100169
 100170
 100171
 100172
 100173
 100174
 100175
 100176
 100177
 100178
 100179
 100180
 100181
 100182
 100183
 100184
 100185
 100186
 100187
 100188
 100189
 100190
 100191
 100192
 100193
 100194
 100195
 100196
 100197
 100198
 100199
 100200
 100201
 100202
 100203
 100204
 100205
 100206
 100207
 100208
 100209
 100210
 100211
 100212
 100213
 100214
 100215
 100216
 100217
 100218
 100219
 100220
 100221
 100222
 100223
 100224
 100225
 100226
 100227
 100228
 100229
 100230
 100231
 100232
 100233
 100234
 100235
 100236
 100237
 100238
 100239
 100240
 100241
 100242
 100243
 100244
 100245
 100246
 100247
 100248
 100249
 100250
 100251
 100252
 100253
 100254
 100255
 100256
 100257
 100258
 100259
 100260
 100261
 100262
 100263
 100264
 100265
 100266
 100267
 100268
 100269
 100270
 100271
 100272
 100273
 100274
 100275
 100276
 100277
 100278
 100279
 100280
 100281
 100282
 100283
 100284
 100285
 100286
 100287
 100288
 100289
 100290
 100291
 100292
 100293
 100294
 100295
 100296
 100297
 100298
 100299
 100300
 100301
 100302
 100303
 100304
 100305
 100306
 100307
 100308
 100309
 100310
 100311
 100312
 100313
 100314
 100315
 100316
 100317
 100318
 100319
 100320
 100321
 100322
 100323
 100324
 100325
 100326
 100327
 100328
 100329
 100330
 100331
 100332
 100333
 100334
 100335
 100336
 100337
 100338
 100339
 100340
 100341
 100342
 100343
 100344
 100345
 100346
 100347
 100348
 100349
 100350
 100351
 100352
 100353
 100354
 100355
 100356
 100357
 100358
 100359
 100360
 100361
 100362
 100363
 100364
 10

- 1 B. Element 2: The customers were “covered telephone customers” which
2 means they were individuals in Wisconsin who received basic local exchange
3 service or commercial mobile service from a telecommunications utility (See
4 Wis. Admin. Code ATCP § 127.80(4)); and
5
6 C. Element 3: The state do-not-call registry means the portion of the
7 national do-not-call registry that consists of numbers with Wisconsin area
8 codes (Wis. Admin. Code ATCP § 127.80(6r); and
9
10 D. Element 4: The national do-not-call registry means the national
11 database established by the federal trade commission under 47 USC §
12 227(c)(3) that consists of telephone numbers of residential customers who
13 object to receiving telephone solicitations (Wis. Admin. Code ATCP §
14 127.80(5)).

15 162. Prerecorded Message Subclaim: Knowingly facilitate any person in using
16 electronically prerecorded messages in telephone calls to encourage purchases without first
17 obtaining written consent (See Wis. Admin. Code ATCP §§ 127.83(2)(b), (d)).

- 18 A. Element 1: Defendants knowingly facilitated persons to use
19 electronically prerecorded messages in telephone calls to encourage
20 customers to make purchases without first obtaining the customers’ consent
21 (See Wis. Admin. Code ATCP §§ 127.83(2)(b), (d)); and
22
23 B. Element 2: The customers were covered telephone customers or
24 noncovered telephone customers. “Noncovered telephone customer” means
25 a means a person, other than a covered customer, who receives
26 telecommunications service from a telecommunications utility (See Wis.
27 Admin. Code ATCP §§ 127.80(4), (6); and
28
29 C. Element 3: The purchases were for property, goods, or services, (See
30 Wis. Admin. Code ATCP § 127.83(2)(b)); and
31
32 D. Element 4: Consent is a written agreement that contains the telephone
33 number and signature of the customer to be called, that discloses in writing

1 that the customer is not required to sign the agreement as a condition of
2 making a purchase and authorizes telemarketing calls from that person (See
3 Wis. Admin. Code ATCP § 127.83(2)(b)); and

4 E. Element 5: The person was not a nonprofit organization, (See Wis.
5 Admin. Code ATCP §127.80(10)(a))¹²; and

6 F. Element 6: The person was not an individual acting on his or her own
7 behalf (See Wis. Admin. Code ATCP § 127.80(10)(b)).

10

11

12

13

14

15

16

17

18

19

20

21 ¹² The lengthy provisions of Wis. Admin. Code ATCP §§ 127.80(10)(a) and (b) are set
forth here in abbreviated form.